# 83-1458



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1983 TERM

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| FRANK E. FERREIRA, and MILGEN INVESTMENT COMPANY<br><br>Petitioners,<br><br>v.<br><br>L&M PROFESSIONAL CONSULTANTS, INC., a corporation; and CITY OF CHULA VISTA,<br><br>Respondents. | ) CASE NO. |

## PETITION FOR WRIT OF CERTIORARI

STERNBERG, EGGERS, KIDDER & FOX
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# I

## QUESTIONS PRESENTED FOR REVIEW

1. Are California Civil Code section 1001 and Code of Civil Procedure section 1245.325 (which allow a City Council to authorize a private citizen to condemn portions of his or her neighbor's private land for private construction of sewer and drainage pipelines to enable the private construction of an exclusive private residential development of $350,000 homes, for private profit) a lawful and constitutional statutory scheme (under the Fifth and Fourteenth Amendments to the United States Constitution) both on their faces and as actually applied in this case?

2. Does a City Council violate fundamental Due Process of Law (under the Fifth and Fourteenth Amendments to the United States Constitution) by closing a public hearing on the question of whether or not private

land should be condemned (after hearing objections and alternative proposals from the affected property owner), and then postponing the completion of the hearing to obtain more information, and then conducting a second "closed" hearing where new and additional testimony and evidence favoring the condemnation is presented by a City employee without allowing the affected private property owner the opportunity to respond or to refute the new evidence, and then proceeding to approve the condemnation of the property owner's land using (in part) the unrefuted testimony and evidence presented by the City employee at the "closed" hearing as factual justification for the condemnation?

3. Is a City Council's adoption of a resolution authorizing a private citizen to file a condemnation lawsuit to condemn a portion of his or her neighbor's land in order to make possible the construction of a profit-making, private, luxury residen-

tial project a "quasi-judicial" governmental decision which requires the City Council to justify its decision by making specific factual findings in its condemnation resolution (as contrasted to the recital of mere ultimate conclusions) so that the affected private citizen and the reviewing Court can determine whether or not the City Council abused its discretion and/or violated the law, according to the "Due Process" guidelines (Fifth and Fourteenth Amendments to the United States Constitution) established by the California Supreme Court in Topanga Association for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506, 516-517, and City of Rancho Palos Verdes v. City Council (1976) 59 Cal.App.3d 869, 889?

4. Does the concept of "just compensation" under the Fifth and Fourteenth Amendments to the United States Constitution require the property owner to receive a rate of interest compounded each year on his or

her condemnation judgment at the "market rate" (the rate of return a reasonably prudent investor could have received from secure investments at prevailing market rates of the amount of money finally awarded in a condemnation case during the delay period between when the suit was filed and the land taken, and when the final money judgment was entered) or at an artificially fixed "legal rate" (see 7 percent simple interest, California Constitution: Art. XV, Section 1(2); Code of Civil Procedure section 1268.310) which can represent a lower rate of return than the "market rate" of interest?

## II

## LIST OF PARTIES AND ATTORNEYS OF RECORD IN THIS PROCEEDING

| PARTY | ATTORNEY OF RECORD |
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| PARTY | ATTORNEY OF RECORD |
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OFFICIAL REPORTS BELOW

Attached hereto as Appendix B is a true copy of the official published opinion below in the case of L&M Professional Consultants, Inc. v. Ferreira (1983) 146 Cal.App.3d 1038. The opinion was issued on September 13, 1983, by the Court of Appeal, State of California, Fourth Appellate District, Division One. The California Supreme Court on November 23, 1983, issued an order denying petitioners' request for a hearing. This "order" was on a postcard and a copy is shown on the attached Appendix A. The California Supreme Court did not issue a written opinion or provide any written or oral explanation for denying the petitioner's request for a hearing.

VI

STATEMENT OF JURISDICTION

This petition for writ of certiorari is authorized under 28 United States Code,

section 1257(3) and timely filed pursuant to 28 United States Code, section 2101(c). Because this case challenges the constitutionality of certain statutes of the State of California, petitioners are serving a copy of this petition on the Attorney General of the State of California pursuant to 28 United States Code, section 2403(b). This petition seeks a review of that decision rendered by the Court of Appeal, State of California, Fourth Appellate District, Division One, entitled L&M Professional Consultants, Inc. v. Ferreira (1983) 146 Cal.App.3d 1038. A true copy of this decision (issued September 13, 1983) is attached hereto as Appendix B. On November 23, 1983, the California Supreme Court denied petitioners' request for hearing to review the lower court decision. The California Supreme Court is the court of last resort in California for petitioners. Petitioners have fully exhausted all

California judicial review and now seek relief in this honorable Court. The 90-day time period within which to file this petition for writ of certiorari expires at the close of business on February 21, 1984. This petition was timely filed by U.S. Mail on February 17, 1984, pursuant to the authority of U.S. Supreme Court Rule 28(2). A more detailed chronology of the factual and procedural history of this case is found in Section VIII, and is entitled STATEMENT OF THE CASE.

## VII

## CALIFORNIA STATUTES CHALLENGED FOR JUDICIAL REVIEW

The petitioners are challenging the California statutes which allow a private citizen to utilize the power of condemnation (eminent domain) for purposes of acquiring portions of his or her neighbor's land for use as utility easements. These statutes are as follows:

California Civil Code section 1001:

§ 1001. [EASEMENT TO PROVIDE UTILITY SERVICE.] (a) As used in this section, "utility service" means water, gas, electric, drainage, sewer, or telephone service.

(b) Any owner of real property may acquire by eminent domain an appurtenant easement to provide utility service to the owner's property.

(c) In lieu of the reuirements of Section 1240.030 of the Code of Civil Procedure, the power of eminent domain may be exercised to acquire an appurtenant easement under this section only if all of the following are established:

(1) There is a great necessity for the taking.

(2) The location of the easement affords the most reasonable service to the property to which it is appurtenant, consistent with the least damage to the burdened property.

(3) The hardship to the owner of the appurtenant property, if the taking is not permitted, clearly outweighs any hardship to the owner of the burdened property. [1976 ch 994 § 1.]

California Code of Civil Procedure section 1245.325:

§ 1245.325. [UTILITY SERVICE EASEMENT; RESOLUTION] Where an owner of real property seeks to acquire an appurtenant easement by eminent domain pursuant to

Section 1001 of the Civil Code:

(a) The person seeking to exercise the power of eminent domain shall be deemed to be a "quasi-public entity" for the purposes of this article.

(b) In lieu of the requirements of subdivision (c) of Section 1245.340, the resolution required by this article shall contain a declaration that the legislative body has found and determined each of the following:

(1) There is a great necessity for the taking.

(2) The location of the easement affords the most reasonable service to the property to which it is appurtenant, consistent with the least damage to the burdened property.

(3) The hardship to the owner of the appurtenant property, if the taking is not permitted, clearly outweighs any hardship to the owner of the burdened property. [1976 ch 994 § 1.]

Petitioners are also challenging the California Constitution at Article XV, Section 1, which fixes a ceiling on the rate of interest to be paid on a condemnation judgment at not more than 10 percent. The "legal rate" on condemnation judgments (during the appeal of the case at bar) was seven percent (See Appendix B, L&M, supra,

146 Cal.App.3d 1038, at pp. 1047 and 1057-1058, for seven percent "legal" rate) simple interest until July 1, 1983, when the legislature raised the rate to 10 percent by creating California Code of Civil Procedure section 685.010. Petitioners are claiming that the U.S. Constitution (Fifth and Fourteenth Amendments) authorizes them to claim and receive the prevailing "market rate" of interest (compounded) on their condemnation award (pre and post judgment). Petitioners claim that the rate of interest cannot be legally and constitutionally "fixed" or limited by a "legal rate" under the California Constitution. The challenged California Constitution section reads, in pertinent part, as follows: California Constitution, Article XV, Section 1:

ARTICLE XV. USURY

. . . .
. . . .
. . . .

The legal rate of interest upon a judgment rendered in any

court of this state shall be set by the Legislature at not more than 10 percent per annum. Such rate may be variable and based upon interest rates charged by federal agencies or economic indicators, or both.

In the absence of the setting of such rate by the Legislature, the rate of interest on any judgment rendered in any court of the state shall be 7 percent per annum.

The provisions of this section shall supersede all provisions of this Constitution and laws enacted thereunder in conflict therewith. (Added June 8, 1976. Amended June 6, 1978; Nov. 6, 1979.)

## VIII

## STATEMENT OF THE CASE

The record below is voluminous and petitioners will have the entire record transmitted to this Court at a future appropriate time. Petitioners FERREIRA and MILGEN will both be collectively referred to herein as FERREIRA. The respondents are referred to as L&M and CITY. The Reporter's Transcript is cited as R.T.

and the Clerk's Transcript is cited as C.T. All references to statutes are to California statutes relating to condemnation (eminent domain).

A. PROCEDURAL HISTORY

On September 19, 1979, respondent L&M filed in the Superior Court of San Diego County, California, a complaint in eminent domain for condemnation of an easement across the property of petitioners FERREIRA and MILGEN INVESTMENT COMPANY. (I C.T. 1.) On October 10, 1979, this complaint was amended. (I C.T. 68.) This was done under the "private condemnation" statutes found at Civil Code section 1001 and Code of Civil Procedure section 1245.325.

On November 19, 1979, defendants FERRIERA and MILGEN INVESTMENT COMPANY (hereinafter "MILGEN") filed an answer to the first amended complaint. (I

C.T. 74.) This case was entitled L&M Professional Consultants, Inc., v. Frank E. Ferreira, et al. (Case No. 441118).

On December 3, 1979, FERREIRA and MILGEN filed a petition for writ of mandate and request for declaratory relief. (III C.T. 1.) On January 15, 1981, an amended petition was filed. (III C.T. 32.) This case was entitled Frank E. Ferreira v. City of Chula Vista (Case No. 444681).

The petition sought a writ of mandate ordering respondent CHULA VISTA CITY COUNCIL (hereinafter "CITY"), to rescind and vacate its condemnation decision contained in Resolution No. 9753. (III C.T. 5:19-23.) The petition also sought declaratory relief on the grounds that the Resolution was unlawfully adopted and defective and that Civil Code section 1001 was unconstitutional.

(III C.T. 3-6.) On December 23, 1980, all parties filed a stipulation for consolidation of these two cases (Nos. 441118 and 444681). (I C.T. 100:1-9.)

On February 23, 24, 25, 26, and March 2, 1981, the matter of the writ came on for hearing before Judge James L. Focht of the Superior Court, County of San Diego, California. On May 5, 1981, Judge Focht entered a final judgment denying the issuance of the writ of mandate and request for declaratory relief. (III C.T. 153.) A Notice of Appeal was timely filed on May 20, 1981, appealing this judgment. (III C.T. 156.) The appeal was to the Court of Appeal, State of California, Fourth Appellate District, Division One.

The trial of the condemnation phase of the case actually began on February 23, 1981, and continued through April 6, 1981. (II C.T.

351:25-27.) On April 7, 1981, Judge Focht announced in court his judgment in favor of L&M (XIV R.T. 412:13-425:1), and on May 20, 1981, a Notice of Appeal was timely filed, appealing the judgment in the eminent domain phase of the case. (II C.T. 347.) On October 5, 1981, a judgment in condemnation was entered by Judge Focht in favor or L&M. (II C.T. 383.) On November 9, 1981, a final order of condemnation was entered. (II C.T. 393.)

It should be noted that on October 2, 1979, respondent L&M filed a "lis pendens" with the San Diego County Recorder (I C.T. 52-53) which has placed a legal cloud on petitioners' land ever since. By a court order signed October 10, 1979, respondent L&M was given the full right to possess and use petitioners' land commencing on November 13, 1979 (I

C.T. 58-59). Petitioners could not withdraw and use the money deposited with the Court as probable compensation because their objections to the condemnation would be "waived" as a matter of law under Code of Civil Procedure section 1255.250. This "waiver" would seem to apply to any appeal. No withdrawal of money has yet occurred. These clouds and encumbrances, along with the final condemnation judgment, have placed a restriction on the full use of petitioners' land from October 2, 1979, and continuing throughout the trial and appeal of this case. Petitioners cannot "withdraw" their money for fear of "waiving" their appeal rights.

The Court of Appeal consolidated these two cases (4 Civil 24888 and 4 Civil 24836) and filed a lengthy written opinion (certified for publication) on September 13, 1983. A

complete copy of the decision is attached as Appendix B hereto. Petitioners timely filed their petition for Rehearing on September 28, 1983, which was denied by the Court on October 5, 1983, without modifying its original opinion.

On October 24, 1983, Petitioners filed their "Petition for Hearing" in the California Supreme Court. The California Supreme Court refused to grant a hearing and so indicated by issuing an order denying hearing on November 23, 1983. A true copy of the order is attached as Appendix A hereto. The 90-day period for applying to this court expires at the close of business on February 21, 1984. This petition was placed in the mail to the Clerk on February 17, 1984, and is timely filed by mail under U.S. Supreme Court Rule 28(2).

B. STATEMENT OF FACTS

Petitioners FERREIRA and MILGEN were at all relevant times the owners of property abutting property owned by respondent L&M. (II C.T. 352: 20-26; 353:6-27; 354-356:8.) The private property of L&M is not landlocked; it has direct access to a public road called Hilltop Drive. At the time L&M purchased its property, the entire site of 10.9 acres was undeveloped, except for one house, a tennis court, a recreation building, a well house and a swimming pool. (II C.T. 353: 16-19.) The house on L&M's property was serviced by a septic system. (II C.T. 356: 9-11.)

In late 1978, L&M, a private developer, hired an engineering firm to draw up a plan for construction of 18 single-family detached residences on its property. (II C.T. 356:12-14.) These residences were intended to

share an identity with the fine section of expensive single-family residences along the property's southern boundaries (II C.T. 368:7-10) and would probably be offered for sale at the maximum residential price in the area, approximately $380,000 each. (II R.T. 390:8- 391:7; VI R.T. 93:1-13.)

Mr. Leon Deicas, president of L&M, testified at trial that he knew in processing his property for development that he was taking a risk he might not be able to negotiate or might not be able to get any governmental approval for sewering across private property. (II R.T. 377:5-15.)

After approval of a tentative map, L&M tried to meet the prior objections of FERREIRA and MILGEN with drawings of various sewer easements through petitioner's property. (II C.T. 360:3-11.) No agreement was reached. (II C.T. 360.)

L&M then requested a Resolution from the CITY, consenting to L&M's acquisition of petitoners' property by eminent domain (II C.T. 360:25-27), based on Civil Code section 1001 and Code of Civil procedure section 1245.325.

On August 14, 1979, a duly noticed public hearing was held to consider L&M's request for a condemnation resolution. (II C.T. 360:25-361:5.) FERREIRA, his engineer, Guy Winton and petitioners' attorney, Poynor, testified that FERREIRA was opposed to any condemnation at all and proposed an alternative plan for development of L&M's property which would not require the private developer's condemnation of petitioners' private property. (I C.T. 114, 116, 120, 126-127; II C.T. 364:23-24.) The CITY rejected the possibility of no condemnation because its engineer,

Lippitt, advised that FERREIRA's specific proposal for development was infeasible. (II C.T. 364:22- 365:5.)

At the August 14, 1979, hearing, all parties testified as to the location of an easement if the CITY insisted on condemnation of petitioners' property; the parties discussed L&M's proposed easement (hereinafter "red easement") and FERREIRA's counterproposal (hereinafter "blue easement no. 1"). (II C.T. 361:9-19; I C.T. 105-127.) The CITY granted a two-week continuance of the hearing to study the location of the proposed easement. (II C.T. 365:10-11.) The CITY also permitted all sides to give input to the CITY's staff during the two-week period. (I C.T. 131, 133.) Petitioners did not waive any objections when their attorney, Poynor, consented to the continuance and were not estopped from complaining about

the procedures which followed. (II C.T. 365:21-24.)

Despite its decision to continue the hearing for further study and to receive more input on alternatives, the CITY closed the public hearing at the end of the August 14, 1979, hearing. (I C.T. 127, 132.) Public testimony was thus ended while the issue of easement location was still pending.

On August 28, 1979, the CITY resumed its hearing but Mayor Hyde insisted that no public testimony would be heard. (I C.T. 139, 147, 149.) The CITY's action was explained at trial as simply the CITY's practice of holding a public hearing for testimony followed by a staff summary and evaluation of the public testimony taken at the open hearing. (R.T. 102:8-21.) However, the CITY's engineer, Lippitt, proceeded beyond a

mere summary and evaluation of public testimony.

Lippitt testified that during the two- week period, Lippitt consulted with representatives from the City Planning Commission and the parties involved and his testimony was very damaging to the petitioners' position in the dispute. (I C.T. 140- 48.) In particular, Lippitt stated that he met with FERREIRA and the developer (L&M) and that FERREIRA presented a third alternative for an easement (hereinafter "blue easement no. 2"), which was more preferable to FERREIRA than any other preceeding proposals, although still objectionable as opposed to no condemnation. (I C.T. 140- 41.)

During the hearing of August 28, 1979, Mayor Hyde repeatedly refused to reopen the hearing to public testimony and to recognize FERREIRA's and

Poynor's requests to speak. (I C.T. 139, 147, 148.) The Mayor acted upon the advice of the City Attorney who stated ". . . there has been no new evidence presented from this staff that would require refutation or comment by the party . . . Certainly there are arguments here arguable on any one of these [proposed easements]. It is very difficult." [Emphasis added.] (I C.T. 147.) Petitioners' request to speak was denied simply on the ground that the hearing had been closed on August 14, 1979. (II C.T. 362:21-27.) The California Court of Appeal, below in L&M v. Ferreira (1983) 146 Cal.App.3d 1038, used evidence produced at this "closed" hearing (see 146 Cal.App.3d at page 1057) as a basis for upholding the decision of the CITY to approve the condemnation. A true copy of this decision is attached hereto as Appen-

dix B.

On September 4, 1979, the CITY adopted Resolution No. 9753 (thereafter amended, Resolution No. 9792, hereinafter "Resolution") (I C.T. 14, 71), consenting to L&M's condemnation of petitioners' property and acquisition of blue easement no. 1. (II C.T. 363:14-354:4.) Poynor repeated FERREIRA's objection to the CITY's refusal to permit public testimony at the August 28, 1979, hearing; but upon the advice of the City Attorney, the hearing was not reopened. (II C.T. 362:27-363:5.)

At the trial below, the parties stipulated as to the appraised value of petitioners' condemned land, and petitioners were permitted to brief the question of whether or not the condemnation judgment should apply the "legal rate" of pre and post judgment interest as compared to the usually

higher "market rate" of interest. (XIV R.T. 439-441.)

### C. HISTORY OF RAISING CONSTITUTIONAL ISSUES BELOW

As seen in the decision below in L&M Professional Consultants, Inc. v. Ferreira (1983) 146 Cal.App.3d 1038 (a true copy of which is attached hereto as Appendix B), the petitioners have properly and timely raised their constitutional issues in the California courts in such a manner as to give the U.S. Supreme Court jurisidction to review the decision and judgment below.

All constitutional challenges (as specified in the lower court decision in Appendix B) were raised and decided in the trial court and in the appellate court. All of the constitutional questions raised by petitioners were decided against them. The trial court and the appellate court found no unconstitutionality in the California statutes reviewed and no violation of

petitioners' "due process of law" rights.

The petitioners strongly disagree with the decisions of the trial court and appellate courts and petitioners have properly preserved their legal rights so as to entitle them to raise their constitutional claims in this petition for writ of certiorari.

## IX

## ARGUMENT SUPPORTING ALLOWANCE OF THE WRIT

Pursuant to the provisions of U.S. Supreme Court Rule 21(1)(j) and 17, petitioners herein claim there is good cause to allow and issue the rquested writ of certiorari based upon the guidelines contained in U.S. Supreme Court Rule 17(1)(b) and (c).

In the decision below, (see Appendixes A and B) we have a California Court of last resort incorrectly deciding the question (and failing to decide the question) of the appropriate "interest rate" on condemnation

judgments in conflict with the decision of another California Court of last resort (see Appendix C), and in conflict with other decisions of federal courts of appeals (U.S. v. Blankenship (9th Cir. 1980) 543 F.2d 1272, 1276-1277). This lower court decision is erroneous because it allows the state court condemnation judgment rendered below to stand at the seven percent "legal" fixed rate of interest (pre and post judgment) as per the limitations of the California Constitution, Article XV, Section 1, even though petitioners sought to challange this limitation on constitutional grounds because the Fifth and Fourteenth Amendments to the United States Constitution allow a "market rate" of interest on condemnation judgments which allows a prevailing rate of interest. The lower court should not have allowed the fixed 7% "legal" interest rate to apply to the condemnation judgment. Such a "fixed" rate is unconstitutional. As will be

discussed below, the question of interest rates on condemnation judgments is a question of nationwide significance and each year affects millions of property owners (victims of condemnation lawsuits) in each of the 50 states.

The lower court also failed to follow court decisions at the state and federal level (as well as provisions of the United States Constitution) with respect to the challenges to the "private condemnation" statutory scheme now under attack. The lower court's decision refused to uphold petitioners' "due process of law" rights in a government (color of state law) hearing conducted by the City Council of the City of Chula Vista, California, in violation of decisions of state and federal courts as well as in violation of the United States Constitution. These issues also have material significance because of the widespread use of a variety of condemnation powers in each of the 50 states.

A. THE CALIFORNIA PRIVATE CONDEMNATION STATUTORY SCHEME IS UNCONSTITUTIONAL.

1. The Private Condemnation Scheme is primarily for Private Purposes, Not Public Purposes.

In the case at bar, the City Council tried to cloak itself in "public interest" by allowing a private developer to condemn petitioners' adjoining private land for a sewer and drainage easement so the developer (who bought the land knowing there was a risk of not getting sewer through adjoining provate land - see II R.T. 377:5-15) could build 19 luxury homes in the price range of $380,000 each, for a private profit. This is not a case where the sanitary and public health benefits of sewers are at issue, this is a case of whether or not private enterprise can take a neighbor's private land for purely a private profit making venture. Petitioners at trial demonstrated other sewer alternatives which would not have involved condem-

nation and those alternatives were rejected by the trial court. They cost more money, but would have avoided condemnation.

While it may be very convenient and efficient to confiscate your neighbor's land for a private profit making venture (this is not a case involving redevelopment and the elimination of blight under the California Community Redevelopment Law), such a scheme is clearly illegal and unconstitutional. The statutes don't describe adequate limits on these private powers.

The Fifth and Fourteenth Amendments to the United States Constitution establish that the power of eminent domain may only be exercised to condemn property for a public, as distinguished from a private, use. Article I, section 19 of the California Constitution also establishes that property may only be taken for a public and not a private use. Finally, Code of Civil Procedure section 1240.010 restates the

constitutional limitation that the power of eminent domain may be exercised only for a public use.

Nichols, the leading authority on eminent domain law, states:

> It is the universally established rule that private property can constitutionally be taken by eminent domain only for a public use. Citations (2A Nicholas on Eminent Domain (1981) pp.7-4.1)
> . . .
>
> A state statute which authorized a taking for a use clearly private, though specifically authorized by the constitution of the state, would be overturned by the Supreme Court of the United States [citations], or even by the highest court of the state itself, since the federal constitution is binding upon the courts of every state notwithstanding any provision of its own constitutions. [Citation] (2A Nichols on Eminent Domain (1981) pp. 7-16). (Emphasis Added)

Civil Code Section 1001 and Code of Civil Procedure section 1245.325 simply don't require takings of land for "public use", but are instead firmly rooted in private uses and benefits. These statutes

are unconstitutional under the guidelines of City and County of San Francisco v. Ross (1955) 44 Cal.2d 52, at page 59:

> . . . the constitution does not comtemplate that the exercise of the power of eminent domain shall secure to private activities the means to carry on a private business whose primary objective and purpose is private gain and not public need.

This statutory scheme has been recognized as unconstitutional in 8 Pacific Law Journal 461 (1976). All of the above points can be more fully developed in a brief on the merits.

2. The Statutory Scheme is Void For Vagueness

It is a basic principle of due process that a statute is unconstitutionally vague if its standards are not clearly defined and ascertainable. Men of common intelligence cannot be required to guess and speculate at the meaning of the enactment of the statute. Pringle v. City of Covina

(1981) 115 Cal.App.3d 151, 157.

The requirement of "great necessity" as set forth in Civil Code section 1001 and Code of Civil Procedure section 1245.325 contains vague statutory language. These statutes contain no definition of what is a "great necessity," nor have the courts construed its meaning. May only property which is landlocked condemn for ingress and egress? Or, alternatively, is it sufficient to place an easement along an adjacent landowner's lot merely because it is more convenient or cheaper to the acquiring landowner than another route which would not require a taking? What standing does a private owner have to use these "private" condemnation powers when he or she bought the land knowing it was expensive to sewer or was landlocked?

The requirement that the "location of the easement affords the most reasonable service to the property to which it is appurtenant, consistent with the least

damage to the burdend property" is even more vague. The phrase "most reasonable service" is vague in itself, but, in addition, one is left to wonder as to what sort of balancing is here required.

Is it sufficient to place an easement along a proposed route merely because it is less expensive than another route proposed by the burdened landowner? At what point should the legislative body say that the easement proposed by the burdened landowner is too much more expensive than the easement proposed by the landowner seeking to condemn. Is an increased project cost of 5 percent or 50 percent allowable before private condemnation is resorted to? And whose opinion should prevail as to the "least damage" to the burdened property?

The third requirement in which the hardships are balanced is also vague. Is the landowner seeking to condemn required to show that he or she will be unable to make any use of his or her property unless

a taking is permitted--or is it sufficient if he or she merely makes a showing that he or she will be inconvenienced if a taking is not allowed? Most importantly, may the burdened landowner prevent condemnation only upon showing that his or her land will be left without any substantial value after the taking? What are the limits of this power?

The standards set forth in Civil Code section 1001 and Code of Civil Procedure section 1245.325 leave the local "legislative body" to guess and speculate at their meaning and they are thus left with unlimited discretion in granting a resolution authorizing a private landowner to acquire property by eminent domain. The court is here urged to either strike these statutes down as being unconstitutionally vague or to narrowly construe their meaning.

The language of these statutes is so broad and vague that virtually any private

citizen's request can be granted to condemn a neighbor's land. This is not right. Condemnation powers are not to be handed out to private citizens in an indiscriminant manner.

3. The Statutory Scheme Violates and Denies Equal Protection of the Law

Civil Code section 1001 and Code of Civil Procedure section 1245.325 provide that the private citizen-owner seeking to condemn property shall be considered a "quasi-public" entity and set forth three requirements that must be met before the power of eminent domain can be exercised. First, there must be "a great necessity" for the taking; second, the location of the easement must afford "the most reasonable service possible" to the benefited property and be placed so as to cause the "least possible damage" to the burdened property; and finally, the hardship on the condemnor if the taking is not permitted must clearly outweigh the hardship on the owner of the

burdened property if the taking is permitted. (Civ. Code § 1001(c); Code Civ. Proc. § 1245.325(b).) The above three requirements are specified to be in lieu of the requirements set forth in Code of Civil Procedure sections 1240.030 and 1245.340 which are the requirements that must be met by all other public or quasi-public entities in California before the power of eminent domain can be exercised. These requirements are that, first, the public interest and necessity require the project; second, the project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury; and finally, the property sought to be acquired is necessary for the project. (Code Civ. Proc. §§ 1240.030 and 1245.340.) Thus, the California legislature has set up two different statutory schemes, the application of which depends upon whether the condemnor is a public or quasi- public entity as described in Code

of Civil Procedure section 1245.325(a) or a quasi- public entity as described in Code of Civil Procedure section 1245.320.

In City of Pasadena v. Stimson (1891) 91 Cal. 238, the California Supreme Court Reviewed (i) section 870 of the Municipal Corporation Act, which set forth the requirements to be followed by a municipal corporation invoking the exercise of the power of eminent domain; and (ii) Civil Code section 1001, which set forth the requirements to be followed by all other persons invoking the exercise of the power of eminent domain. The court held that section 870 was invalid, as it violated Article I, section 2 of the California Constitution [now Article IV, Section 16(a)], which provides that all laws of a general nature shall have a uniform operation, and Article IV, Section 25 of the California Constitution [now Article IV, Section 16(b)], which provides that the legislature shall not pass local or special

laws in cases where a general law can be made applicable. The court reasoned that section 870:

> . . . destroys the uniform operation of a general law, and is special in a case where a general law not only can be made applicable, but in which a general law had been enacted, and in which there is no conceivable reason for discrimination.
>
> . . . the mode of exercising the power of eminent domain, and the conditions upon which it may be invoked . . . are the subject of general laws applicable to every person alike, and the legislature has no power to make arbitrary discriminations in this respect between different classes of persons.

Similarly, in the instant case, Code of Civil Procedure section 1245.325 and Civil Code section 1001 destroy the uniform operation of a general law because they impose requirements that are different from those imposed by the general law, which is set forth in Code of Civil Procedure sections 1240.030 and 1245.340. Specifically, Civil Code section 1001 and Code of Civil Procedure section 1245.325 require

that the private landowner, who is deemed to be a quasi-public entity (Code Civ. Proc. § 1245.325(a), establish "great necessity" for the private taking, whereas under Code of Civil Procedure sections 1240.030 and 1245.340, all other public entities or quasi-public entities must establish "public necessity" for the taking.

It should be noted that the same inequality of treatment exists if the condemning party is a public entity. Compare the statutory scheme of Civil Code section 1001 and Code of Civil Procedure section 1240.030 and 1245.230 (setting forth the requirements for the public entity condemnor).

There appears to be no conceivable reason for not treating public entities and quasi-public entities alike so as to require that they all establish public necessity as a prerequisite to condemnation. The Eminent Domain Law is a

general law applicable to every person alike, and any attempt by the legislature to establish arbitrary classifications should be void. The court is therefore urged to hold that the statutory scheme embodied in Civil Code section 1001 and Code of Civil Procedure section 1245.325 is unconstitutional as violating "equal protection" Fourteenth Amendment rights.

As a related matter, the equal protection clause provides that all persons under like circumstances shall be given equal protection and security in the acquisition and enjoyment of property. In re Kotta (1921) 187 Cal. 27; Datta v. Staab (1959) 173 Cal.App.2d 613. Among the civil rights intended to be protected from discriminatroy state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Mulkey v. Reitman (1966) 64 Cal.2d 529. This constitutional mandate as provided in both the United States Constitution (U.S. Const.

14th Amend.) and the California Constitution (Cal. Const., art. 1, § 7) and would seem to invalidate Civil Code section 1001 and Code of Civil procedure section 1245.325. The court is therefore urged to hold that these statutes are unconstitutional as violating the equal protection clause.

It is clear on the face of the statutory scheme that no finding of "public use" is required for the private condemnation to take place. In a regular condemnation, the landowner defendant can at least challenge the "public benefit" or "public use" aspects of the project. In a private condemnation this is not so. This is a denial of "equal protection" to property owner victims of "private" condemnations as compared to normal public entity condemnations.

B. PETITIONERS WERE DENIED FUNDAMENTAL DUE PROCESS AT THE CONDEMNATION HEARINGS CONDUCTED BY THE CITY.

The court below (Appendix B) failed to correctly state the facts relating to the disputed City Council hearings of August 14 and August 28, 1979. At the August 14, 1979, City Council hearing it was the City's engineer who asked for a continuance of the hearing to gather new information and report back to the City (I C.T. 131-134), and this dely was not the fault of petitioners. Even though the hearing was "closed" on August 28, 1979, new evidence and testimony was nevertheless given and the Court of Appeal even relies on this evidence to justify the City's decision (Appendix B-9).

No matter how you look at this case, it is clear that extensive testimony from the CITY's engineer at the "closed" hearing of August 28, 1979, was relied upon by the City Council without allowing the peti-

tioners to respond or refute the testimony that ultimately supported a decision to condemn petitioners' land. What could be a clearer "due process" setting than a government hearing on the question of whether or not your land will be taken away from you on an involuntary basis? The refusal of the CITY to allow simple "due process" (even after being asked) is nothing short of outrageous and the U.S. Supreme Court should intervene to correct the situation.

To allow the CITY's practice to stand in this case would then allow any government entity to allow perfunctory testimony from a property owner at a condemnation hearing, then close the hearing and fill the record with tons of self-serving and uncontradicted evidence in support of the condemnation action, while the citizen watches helplessly and is refused the chance to speak because the citizen already had his or her "chance" to speak.

This tactic becomes even more absurd when the citizen challanges the government's decision in Court only to learn that the Court will uphold the government's decision because of the abundance of self-serving and unrefuted evidence given at the "closed" hearing. While such a "star-chamber" procedure is probably acceptable (and very efficient) in totalitarian societies, it is totally out of keeping with American notions of "due process" and fundamental fairness.

The correct procedure would have been to complete the taking of all evidence, allow the property owner to respond and refute evidence presented by the CITY employees or other witnesses, permit questions by City Council members of all witnesses and CITY employees, and then "close" the hearing and conduct a discussion only between the City Council members as to their recommendations on how to weigh the evidence and how to decide the matter.

Such a process was not followed in the case at bar. Without guidance from the U.S. Supreme Court, this unfair process will be allowed to flourish in cities across California.

The petitioners did not even receive a hearing based upon the statutory provision in the California Eminent Domain Law at Code of Civil Procedure section 1245.350 which reads as follows:

> (a) The legislative body . . . may adopt the resolution required by this article only after the legislative body has had a hearing at which persons whose property is to be acquired by eminent domain have had a reasonable opportunity to appear and be heard. (Emphasis added.)

The scope of procedural safeguards required by Code of Civil Procedure section 1245.350 has not yet been established by either statute or judicial interpretation; however, procedural due process necessarily implies that such a hearing include the right to refute, test and explain all evidence relied upon by the legislative

body. See English v. City of Long Beach (1950) 35 Cal.2d 155, 159; Franz v. Board of Medical Quality Assurance (1982) 31 Cal.3d 124, 140; Roth v. City of Los Angeles (1975) 53 Cal.App.3d 679, 692; Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.2d 85, 194; 5 Witkin, Summary of California Law (8th ed. 1974) pp. 3596-3597).

In English, supra, a hearing was held before the civil service board on charges filed against English. It was found that members of the board took evidence concerning English's competency outside the hearing and outside the presence of English and his attorney. The Court concluded that English was denied a fair hearing, stating:

> The action of such an administrative board exercising adjudicatory functions when based upon information of which the parties were not apprised and which they had no opportunity to controvert amounts to a denial of a hearing. (La Prade v. Department of Water & Power 27 Cal.2d 47 [162 P.2d 13]; see Bandini Estate Co. v. Los Angeles County 28 Cal.App.2d

224, 231 [82 P.2d 185]; of Carstens v. Pillsbury 172 Cal. 572 [158 P. 218] . . .

A hearing requires that the party be apprised of the evidence against him so that he may have an opportunity to refute, test and explain it, and the requirement of a hearing necessarily contemplates a decision in light of the evidence there introduced. (La Prade v. Department of Water & Power, 27 Cal.2d 47, 52 [162 P.2d 13]; Universal Cons. Oil Co. v. Byram 25 Cal.2d 353 [153 P.2d 746]) . . .

Since the board, in arriving at its decision sustaining the order dismissing English, relied upon information taken outside the hearing, which English had no opportunity to refute, the trial court properly concluded that he was denied a fair hearing. (Emphasis added).

The cases of Horn v. County of Ventura (1979) 24 Cal.3d 605 and Kennedy v. City of Hayward (1980) 105 Cal.App.3d 953, required that governmental hearings affecting particular citizen's property rights focus on the concerns of the affected citizen as stated in Kennedy, supra at pages 961-962:

Thus, whenever approval of a tentative subdivision map will constitute a substantial or

> significant deprivation of the property rights of other landowners, the affected persons are entitled to a reasonable notice and an opportunity to be heard before the approval occurs . . .
>
> The court, at page 617 [of the Horn opinion] emphasized that independent of CEQA proceedings, the directly affected owner is entitled to a hearing that focuses on his particular concerns and the general feasibility and desirability of the project. (Emphasis added.)

In Beaudreau v. Superior Court (1975) 14 Cal.3d 448, at page 458 the California Supreme Court said

> . . . in every case, the hearing required by the Due Process Clause must by "meaningful" [citation] and "appropriate to the nature of the case." [Citation.] It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to a decision . . . does not meet this standard." [Citation.] (Emphasis added.)

In the condemnation case of Conejo Recreational & Park District v. Armstrong (1981) 114 Cal.App.3d 1016 (where a property owner was excluded from one condemna-

tion hearing but allowed to appear at another different hearing) the Court dismissed the condemnation lawsuit at trial because of a failure of "due process" at the public hearing stage when the condemnation resolution was adopted. The Court stated the rule applicable to the case at bar in Conejo, supra at page 1021:

> . . . that a landowner should have the right to speak when any matter relating to his property is considered by an agency possessing discretionary authority . . . appears self-evident.

It is clear and undisputed in this case that petitioners were denied the "due process" right to speak, refute, and respond to the testimony given at the August 28, 1979, City Council "closed" hearing. This is a clear denial of a "meaningful" opportunity for due process (see Kennedy, supra, at page 963) and the City's condemnation process (and the resulting private condemnation lawsuit) should be declared unconstitutional and

void.

The above referenced California cases are based on federal principals of "due process".

The "findings" adopted by the CITY are inadequate to support the decision. The landmark case of Topanga Association for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506, 516-517 required government bodies to make specific factual findings of fact [as compared to the mere recital of ultimate conclusions, see City of Rancho Palos Verdes v. City Council (1976) 59 Cal.App.3d 869, 889)] so that concerned citizens and reviewing courts could properly review the factual and legal basis for a governmental decision which affects property rights of citizens. This was an application of federal "due process" standards. The Resolution's factual basis is tainted by the "closed" hearing.

A review of City Resolution 9753 (see Appendix B-9, B-10) reveals a mere collec-

tion of recitals of ultimate conclusions and does not recite the particular evidentiary facts actually relied upon. Apparently some of the facts relied upon by the CITY were those numerous facts testified to by the CITY'S engineer at the "closed" hearing of August 28, 1979, (see the extensive testimony at I C.T. 139-148). From the Resolution, we can't tell what facts and evidence served as the basis for the conclusionary findings.

The Court of Appeal seems to support the Resolution with the testimony from the "closed" hearing (Appendix B-9). It is a clear violation of "due process" to exclude the petitioners from participating in a public hearing, and then to have a reviewing court use the evidence generated at the "closed" hearing to support the CITY'S decision.

C. THE CALIFORNIA FIXED INTEREST RATE LAW AS APPLIED TO CONDEMNATION JUDGMENTS IS UNCONSTITUTIONAL.

The court below upheld the trial court's award of the 7% "legal" rate of interest as established by California Constitution Article XV, Section 1. Petitioners below attempted to request at trial an evidentiary hearing on the pre and post judgment rates of interest at the "market rate." The trial court found that the 7% "legal rate" was proper, and not the "market rate" and therefor found it unnecessary to conduct an evidentiary hearing on the prevailing market rates of interest.

The court below (Appendix B, at 146 Cal.App.3d 1038, 1057-1058) pointed out conflicting cases for "legal rate" and "market rate" as follows:

> Authority exists for awarding interest at either rate. (Legal rate: Brown v. United States (1923) 263 U.S. 78, 86-87 [68 L.Ed. 171, 182, 44 S.Ct. 92]; United States v. Baugh (5th Cir. 1945) 149 F.2d 190, 193; see also

3 Nichols on Eminent Domain (3d rev. ed. 1981) § 8.63[3] at pp. 8-360 to 8-362; market rate: United States v. 429.59 Acres of Land (9th Cir. 1980) 612 F.2d 459, 464; United States v. Blankenship (9th Cir. 1976) 543 F.2d 1272, 1276-1277.)

The court below stated that it did not have to decide which rate of interest applied because petitioners' had remained in possession of the land during the appeal and the possession would offset the additional interest. This is clearly an erroneous analysis. There was no evidence below of the "rental value" for remaining in possession.

The court below also failed to squarely decide whether or not the 7% "legal" rate of fixed interest (which the court below upheld) violated the Fifth and Fourteenth Amendments to the United States Constitution with respect to a property owner's right to receive "just compensation." The court below seemed to treat the issue lightly because the condemnation

award was only $8,400. It is petitioners' view that it should not matter if the condemnation award is $8,400 or $8,400,000 because the "just compensation" principal is the same as to the right to receive the "market rate" of interest on the award. This right should be applicable to all condemnation cases, big and small.

The opinion below also conflicts with the decision of another California court of last resort in an opinion issued January 20, 1984 (attached hereto in its entirety as Appendix C), entitled Redevelopment Agency of the City of Burbank v. Gilmore 2 Civ. No. 68906 issued by the Court of Appeal, State of California, Second Appellate District, Division One. The decision is so new that it does not yet have an official reporter citation.

The decision goes into great detail and can be read in full in Appendix C. The decision indicates that the "market rate" of interest should be paid (pre and post

judgment) if there has been a "taking."

In petitioners' case, the court below pointed out there was no "taking" of the property. The court below failed to realize that there actually was a "taking." Respondent L&M obtained an "order of possession" entitling it to possess the easement, before judgment, on November 13, 1979. This was "constructive" possession which thereafter limited petitioners' free use of the land. This was a "taking." A "lis pendens" was filed on the land on October 2, 1979, when the original condemnation suit was filed. This placed a legal cloud on title to the property and instantly affected its resale value in a negative way. California law (Code of Civil Procedure section 1255.260) creates an automatic "waiver" of all objections to a condemnation proceeding if the money on deposit is withdrawn. Petitioners have still not withdrawn the money on deposit during the pendency of this appeal for fear

that there would be an automatic "waiver" of their rights to object to the condemnation. This deprives them of the use of the money (and any interest) during the pendency of appeal proceedings even after a condemnation judgment was entered on November 9, 1981, giving title and possession of the condemned easement to respondent L&M.

These facts clearly indicate there was a pre-judgment taking and interference with petitioners' land (lis pendens, order of possession, judgment) which constitute a "taking" of property and which entitle petitioners to claim a "market rate" of interest on the award.

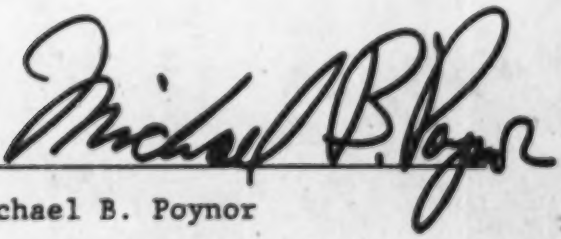
### D. SPECIFIC RELIEF SHOULD BE GRANTED.

Petitioners respectfully request that the lower court's decision as contained in Appendix B be reversed and the case either remanded for trial or dismissed on the

ground that the California statutory scheme for private condemnation is unconstitutional and void, or on alternate grounds that the hearing conducted by the CITY was unlawful and void because the petitioners were denied their "due process" rights to a fair hearing prior to the CITY's decision to authorize the private condemnation.

Dated: February 17, 1984

STERNBERG, EGGERS, KIDDER & FOX
A Professional Corporation

By 

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APR 23 1975

*I have this day filed Order* _____

**HEARING DENIED**

*In re:* 4 Civ. ___ *No.* 24888 24836

L & M PROFESSIONAL CONSULTANTS, INC.

*vs.*

FRANK E. FERREIRA

*Respectfully,*

*Clerk*

AP. A

[146 Cal.App.3d 1038]

[Civ. No. 24836. Fourth Dist., Div. One. Sept. 13, 1983.]

L & M PROFESSIONAL CONSULTANTS, INC., Plaintiff and Respondent, v.
FRANK E. FERREIRA et al., Defendants and Appellants.

FRANK E. FERREIRA et al., Plaintiffs and Appellants, v.
CITY OF CHULA VISTA et al., Defendants and Respondents.

SUMMARY

After a hearing, a city council adopted a resolution consenting to a land developer's private condemnation of an appurtenant easement for sewer and storm drainage across property owned by a partnership. The developer then filed an eminent domain action to acquire the easement under the authority of Civ. Code, § 1001, and Code Civ. Proc., § 1245.325. The trial court rejected the partnership's petition for a writ of mandate to invalidate the resolution of consent and to declare Civ. Code, § 1001, unconstitutional. In the eminent domain action, the trial court

AP. B

entered a judgment of condemnation for the easement, with the developer to pay compensation plus legal interest to the partnership. (Superior Court of San Diego County, Nos. 441118, 444681, James L. Focht, Judge.)

The Court of Appeal affirmed the judgments, holding Civ. Code, § 1001, and Code Civ. Proc., § 1245.325, which provide for private condemnation authority, were neither facially unconstitutional nor unconstitutional as applied to the partnership. The court held the statutes are not unconstitutionally vague in that they do not contain a specific standard for determining when a "great necessity" exists; great necessity does not exist when a condemnation alternative is more preferable than a reasonably acceptable noncondemnation alternative, but only when a condemnation alternative is the sole reasonably acceptable means for providing utility service for a piece of property. The court also held the statutes do not unconstitutionally permit the condemnation of private property for private uses. The statutes constitute a legislative declaration that the private condemnation of a utility easement is for a public use pursuant to Code Civ. Proc., § 1240.010; thus it was unnecessary to include in the statutes the requirements which such takings satisfy by definition. The court further held the hearing procedures adopted by the city council did not violate the due process rights of the



partnership, inasmuch as the partners presented a comprehensive statement of their position, contesting both the necessity and appropriate location for the condemnation, and the fact that they later had another idea for a different location did not mean they had a due process right to another hearing. The court held substantial evidence supported the findings of the city council in its resolution and that the resolution was therefore valid. It also held the owners received a sufficient return on their award. In addition to legal interest, they received value from remaining in possession until after the developer deposited the balance due them under the judgment of condemnation. (Opinion by Wiener, J., with Cologne, Acting P. J., and Lewis, J.,* concurring.)

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**HEADNOTES**

Classified to California Digest of Official Reports, 3d Series

(1) **Eminent Domain § 8—Uses and Purposes Authorized—Legislative Determination—Private Condemnation to Acquire Utility Service.**—In restoring private condemnation authority to owners of private property for the limited purpose of acquiring appurtenant easements to provide utility service to their property (Civ. Code, § 1001, Code Civ. Proc., § 1245.325) the Legislature intended that authority to serve the function of opening what would otherwise be landlocked property to enable its most beneficial use, since as a practical matter land to which utility service cannot be extended cannot be developed.

(2) **Eminent Domain § 11—Property Subject to Condemnation—Necessity for, and Extent of, Condemnation—Private Condemnation to Acquire Utility Service.**—In subjecting private condemnation authority to several limitations, including that a "great necessity" must exist for the proposed taking (Civ. Code, § 1001, subd. (c)(1), Code Civ. Proc., § 1245.325, subd. (b)(1)), which is a stricter standard than the usual "public interest and necessity" requirement applicable generally to eminent domain proceedings, the purpose of the Legislature was to prevent abuses which had been possible under the former emi-

*Assigned by the Chairperson of the Judicial Council.

B-1

nent domain law.

(2a, 3b) Eminent Domain § 11—Property Subject to Condemnation—Necessity for, and Extent of, Condemnation—Private Condemnation to Acquire Public Utility Service—Constitutionality of Statutes.—Civ. Code, § 1001, subd. (c)(1), and Code Civ. Proc., § 1245.325, subd. (b)(1), which provide private condemnation authority to a property owner to acquire an appurtenant easement to provide utility service to the owner's property, if there is a great necessity for the taking, are not unconstitutionally vague in that they do not contain a specific standard for determining when a "great necessity" exists. Great necessity does not exist when a condemnation alternative is more preferable than a reasonably acceptable noncondemnation alternative, since under such circumstances a piece of property is not "otherwise landlocked"; it only exists when a condemnation alternative is the sole reasonably acceptable means for providing utility service to a piece of property.

(4) Statutes § 37—Construction—Giving Effect to Statute—Sustaining Validity—Consideration of Legislative Intent.—Enactments should be interpreted when possible to uphold their validity, and courts should construe enactments to give specific content to terms that might otherwise be unconstitutionally vague. In providing such content, the courts must look to legislative intent so that the purpose of the statute will be achieved.

(5) Eminent Domain § 77—Condemnation Proceedings—Trial—Evidence—Purpose or Necessity of Taking—Private Condemnation to Acquire Public Utility Service—Determination of Necessity.—In a hearing on a proposal by a land developer for private condemnation of an appurtenant easement for sewer and storm drainage across property owned by a partnership, the city council correctly determined a great necessity existed for the condemnation (Civ. Code, § 1001, subd. (c)(1), Code Civ. Proc., § 1245.325, subd. (b)(1)), where the partnership's no-condemnation proposal would have required importing 80,000 cubic yards of fill costing more than $500,000 as compared with a total estimated project development cost of $6,800,000, and where the 18 proposed homes would have had to be clustered rather than spread out on large lots, in violation of the city planners' development and environmental guidelines. Under the circumstances, the no-condemnation proposal was not a reasonably acceptable means of providing utility service to the development, and without the condemnation of the easement, the property could not have been developed.

[See Cal.Jur.3d, Eminent Domain, §§ 12, 13, 56, 57; Am.Jur.2d, Eminent Domain, §§ 20, 111.]

[146 Cal.App.3d 1041]

(6) Eminent Domain § 7—Uses and Purposes Authorized—What Constitutes Public Use or Purpose—Private Condemnation to Provide Utility Service to Owner's Property—Constitutionality of Statutes.—Civ. Code, § 1001, and Code Civ. Proc., § 1245.325, which provide for the private condemnation of property to acquire an appurtenant easement to provide utility service to the owner's property, are not facially unconstitutional for allegedly allowing the condemnation of private property for private uses in violation of constitutional requirements that private property be condemned only for public uses (U.S. Const., Amends. V, XIV, § 1; Cal. Const., art. I, § 19). The statutes must be construed in context and harmonized with companion provisions of an overall statutory system. Civ. Code, § 1001, and Code Civ. Proc., § 1245.325, constitute a legislative declaration that the private condemnation of utility easements is for a public use (Code Civ. Proc., § 1240.010); thus it was unnecessary to include in the statutes requirements which such takings satisfy by

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definition. Furthermore, neither statute abrogates the fundamental public use limitation applicable to all takings by public or quasi-public entities (Code Civ. Proc., §§ 1240.010, 1245.380, 1245.340).

(7) **Eminent Domain § 7—Uses and Purposes Authorized—What Constitutes Public Use or Purpose—Private Condemnation to Provide Utility Service to Owner's Property—Constitutionality of Statutes.**—Civ. Code, § 1001, and Code Civ. Proc., § 1245.325, which provide for the private condemnation of property to acquire an appurtenant easement to provide utility service to the owner's property, are not unconstitutional as applied to the condemnation of a partnership's property by a land developer for sewer and storm drainage in that the developer would profit from its development of an exclusive residential neighborhood. It is clear that the ordinary taking of private property for the purpose of constructing storm drainage systems is a taking for public use. Condemnation of private property to provide sewer service also is a taking for public use. Once it is determined that the taking is for a public purpose, the fact that private persons may receive benefit is not sufficient to take away from the enterprise the characteristics of a public purpose; therefore, the developer's condemnation was not for a private rather than a public use.

(8) **Administrative Law § 38—Administrative Actions—Adjudication—Character of Proceedings—Consent to Private Condemnation of Property.**—The act of a city council in consenting to a land developer's private condemnation of property to acquire an appurtenant easement to provide utility service to the developer's property was



arguably the exercise of its power of eminent domain, which is an inherent attribute of sovereignty. From this point of view, the act was therefore legislative. However, given the particularity of the council's decision and the small size and number of parcels involved and relatively few property owners affected, the act may have been adjudicative, and in fact the council treated it as such, in which case procedural due process requirements apply and judicial review of the decision to consent is by administrative rather than traditional mandamus.

(9) **Constitutional Law § 103—Due Process—Nature—Deprivation of Property Interest.**—Due process principles require reasonable notice and opportunity to be heard before governmental deprivation of a significant property interest, and this applies to temporary as well as final deprivations of property.

(10) **Eminent Domain § 62—Condemnation Proceedings—Consent to Private Condemnation of Property—Hearing—Procedural Due Process.**—The procedures adopted by a city council in a hearing to determine whether to consent to a proposed private condemnation of property to acquire an appurtenant easement to provide utility service to the owner's property did not violate the due process rights of the owners of the condemned property or their statutory rights to a hearing (Code Civ. Proc., § 1245.350, subd. (a)). Although the council's act did not deprive the property owners, even temporarily, of any interest in their property, procedural due process was required for the council's decision to consent, inasmuch as it treated its decision as an adjudicative act. At the hearing, of which the property owners received both adequate notice and a three-week postponement, the property owners presented a comprehensive statement of their position, contesting both the necessity and appropriate location for the condemnation. The fact that they later had another idea for a different location did not mean they had a due process right to another hearing. If that were the law, decisions could be endlessly delayed by the inadvertent omissions or deliberate strategies of prospective condemnees. Due process cannot become a vehicle for bringing the processes of government to a halt.

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(11) **Administrative Law § 113—Judicial Review—Scope and Extent—Independent Judgment and Substantial Evidence Rules.**—In an inquiry into the validity of an administrative decision, judicial review under the independent judgment rule is invoked when an administrative decision substantially affects fundamental vested rights, while review under the substantial evidence test is applied to other adjudicative acts (Code Civ. Proc., § 1094.5).

[146 Cal.App.3d 1043]

(12) **Administrative Law § 131—Judicial Review—Scope and Extent—Evidence—Substantial Evidence Rule—Consent to Private Condemnation of Property.**—The interests of two property owners in their property represented fundamental vested rights. However, the action of a city council in consenting to the private condemnation of the property to acquire an appurtenant easement to provide utility service to another owner's property did not substantially affect those rights, inasmuch as the consent did not deprive the owners of the subsequently condemned property of any interest in their property. Rather, any deprivation resulted from the entry of a judgment of condemnation by the superior court. Therefore, the substantial evidence test applied to the judicial review of the council's decision to consent (Code Civ. Proc., § 1094.5).

(13) **Administrative Law § 131—Judicial Review—Scope and Extent—Evidence—Substantial Evidence Rule—Resolution of Reasonable Doubts.**—In applying the substantial evidence test in review of an administrative decision, a reviewing court must scrutinize the record and determine whether substantial evidence supports the administrative agency's findings and whether these findings support the agency's decision. In making these determinations, the reviewing court must resolve reasonable doubts in favor of the administrative findings and decision, and so long as they are sufficient to apprise the reviewing court of the basis for the agency's decision, the necessary findings may be formal or informal and may be contained in the agency's order or decision.

(14) **Eminent Domain § 79—Condemnation Proceedings — Trial — Evidence — Sufficiency—Administrative Hearing—Private Condemnation to Acquire Easement to Provide Utility Service—Evidence Supporting Findings.**—The findings of a city council in its resolution consenting to a land developer's private condemnation of property to acquire an appurtenant easement to provide utility service to the developer's property were supported by substantial evidence, and supported the decision to consent, where the pertinent evidence supporting the findings appeared in the resolution and where the resolution described the public uses to be served by the easement, identified the statutory authority for the condemnation, described precisely the location and extent of the easement to be taken, explained the great necessity for the taking, justified the location selection, and presented the council's assessment of the relative hardships the parties would bear if the taking was either disapproved or permitted.

[146 Cal.App.3d 1044]

(15) **Eminent Domain § 126—Condemnation Proceedings — Payment — Sufficiency; Enforcement—Sufficiency of Interest Rate.**—On appeal of a judgment permitting a land developer's private condemnation of property to acquire an appurtenant easement to provide utility service to the developer's property, the contention of the owners of the affected property that the trial court violated their constitutional rights to just compensation (U.S. Const., 5th and 14th Amends.) by applying the legal rather than the market rate of interest to their award did not need to be resolved under the particular circumstances of the case. The owners were essentially arguing they did not receive an adequate return on their award, rather than challenging the adequacy of the award itself. Interest may be awarded either at the legal or market rate, and as a practical matter the owners' return

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on the award was sufficient, where in addition to legal interest, they received value from remaining in possession until after the developer deposited the balance due them under the judgment of condemnation.

COUNSEL

Jenkins & Perry, Michael B. Poynor and Karen J. Headley for Defendants and Appellants and Plaintiffs and Appellants.

Gray, Cary, Ames & Frye, Richard A. Paul, Thomas J. Harron and George D. Lindberg for Plaintiff and Respondent and for Defendants and Respondents.

OPINION

WIENER, J.—In September 1979 the Chula Vista City Council (Council) adopted a resolution consenting to the private condemnation by L & M Professional Consultants, Inc. (L & M) of an appurtenant easement for sewer and storm drainage across property owned by Frank E. Ferreira (Ferreira) and Milgen Investment Company (Milgen). L & M then filed an eminent domain action to acquire the easement under the authority of Civil Code section 1001 and Code of Civil Procedure section 1245.325.[1] Ferreira and Milgen unsuccessfully petitioned the superior court to invalidate the

[146 Cal.App.3d 1045]

Council's resolution of consent and to declare Civil Code section 1001 unconstitutional. The court also found in favor of L & M in the eminent domain action and entered a judgment of condemnation for the easement. Ferreira and Milgen appeal both judgments.

Among their many arguments Ferreira and Milgen contend Civil Code section 1001 and section 1245.325 are unconstitutional both on their face and as applied. They also argue the Council denied them due process in the hearings it conducted before consenting to L & M's proposed condemnation, and again challenge the validity of the Council's resolution of consent. Finally, Ferreira and Milgen argue the lower court erroneously applied the legal rather than market rate of interest to their condemnation award. As we shall explain, we reject these arguments and affirm the judgments.

I

FACTUAL AND PROCEDURAL BACKGROUND

We narrate the facts in some detail because of the substantial evidence review required by Ferreira's and Milgen's challenge to the validity of the Council's resolution of consent. (See part III C, *post*.)

In 1978 L & M purchased 10.9 acres of essentially undeveloped hillside property in Chula Vista commonly known as Villa San Miguel for $1,115,000. The property slopes downward in a northerly and northeasterly direction. Ferreira owns or controls all the property on Villa San Miguel's northern and eastern borders. Vehicular access to Villa San Miguel is from the southwest via Hilltop Drive. Stands of mature palm, pine and eucalyptus trees populate the property in the higher elevations near its southern border.

In late 1978 L & M began to prepare a tentative map for the construction of 18 expensive homes at Villa San Miguel. Chula Vista city planners set several guidelines for L & M's project, including the preservation of the property's mature trees and rural character and the avoidance of extensive grading. These guidelines, combined with the property's topography, precluded gravity sewerage and drainage to Hilltop Drive. Consequently, L & M's tentative map proposed locating a sewer easement across Ferreira property north of Villa San Miguel. Drainage was to be onsite.

In early 1979 the Chula Vista Planning Commission and the Council held separate public hearings on L & M's tentative map. Ferreira and his attorney each spoke at both hearings in opposition to L & M's project. They criticized the lack of offsite drainage for the project and described a history

[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

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[146 Cal.App.3d 1046]

of flooding and drainage problems on Ferreira properties resulting from rain water flowing north off of Villa San Miguel. They also claimed L & M's proposed sewer easement would interfere with existing underground utilities. The Council approved L & M's tentative map after L & M agreed to provide offsite drainage and to relocate the sewer easement across a vacant lot northeast of Villa San Miguel. The lot is 0.89 acres in size and had a 1978-1979 assessed value of $10,600. Ferreira and Milgen own the lot through a partnership in which Ferreira acts as the managing partner.

Following the Council's approval of the tentative map, L & M and Ferreira discussed locations for a sewer and storm drainage easement across Ferreira's and Milgen's property. L & M proposed three locations and Ferreira proposed one. After negotiations proved fruitless, L & M sought Council consent to its condemnation of an easement across Ferreira's and Milgen's property. The Council noticed a hearing on L & M's proposed condemnation and then postponed the hearing for three weeks at Ferreira's request.

The postponed hearing convened on August 14, 1979. The hearing transcript is lengthy and shows Ferreira and his attorney each participated extensively, as did Ferreira's engineer. The Council heard testimony and received maps and diagrams describing three alternatives: a "red easement" location proposed by L & M, a "blue easement #1" location proposed by Ferreira and a "no-condemnation" proposal by Ferreira for development of Villa San Miguel with gravity sewerage and drainage to Hilltop Drive. Ferreira also presented his plans to develop a 27-unit apartment complex on his and Milgen's property, and described the initial work (site planning and retaining wall) he had completed on that project. After the parties completed their comments, the Council closed the public hearing and deferred taking action for two weeks to allow its staff additional time to study Ferreira's development plans and blue easement #1 proposal.

On August 28, 1979 the Council reconvened. Ferreira and his attorney again were present. Council staff presented an evaluation of the three alternatives discussed on August 14. The staff also commented on a "blue easement #2" location Ferreira proposed to them during the two-week continuance. After the staff's comments, and without allowing further public testimony, the Council adopted the staff's recommendation to approve L & M's condemnation of a 10-foot wide sewer and storm drainage easement at Ferreira's blue easement #1 location. One week later the Council unanimously adopted a corresponding resolution of consent. (§§ 1245.330, 1245.360.)

[146 Cal.App.3d 1047]

The Council rejected Ferreira's no-condemnation proposal because it would have required importing 80,000 cubic yards of fill costing more than $500,000 and clustering the 18 homes near Hilltop Drive rather than spreading them out on large lots. The Council also rejected Ferreira's blue easement #2 proposal because it would have violated a city ordinance requiring open space above easements, thus creating a serious service and maintenance problem for the city. As between the red easement and blue easement #1 proposals, the Council selected the latter alternative after Ferreira's attorney testified on August 14 that it would "create the least damage" to development plans for Ferreira's and Milgen's property and would "not in any way interfere with the highest and best use of that property." L & M estimated its condemnation and utility installation costs at the blue easement #1 location would be $106,000, approximately double its estimated costs at the red easement location.

In September 1979 L & M filed an action to condemn the easement approved by the Council and deposited the probable compensation for the easement. (§ 1255.010.) In October L & M obtained an order for possession of the easement as of mid-November. (§ 1255.410.) Ferreira and Milgen did not withdraw the deposited compensation (§ 1255.210) or seek a stay of the order for possession. (§§ 1255.420, 1255.430.) Instead, they petitioned the superior court in December for a writ of mandate (§ 1094.5) ordering the Council to rescind its resolution of consent and declaring Civil Code section 1001 unconstitutional. In May 1981 the lower court entered a judgment on an order

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denying Ferreira's and Milgen's petition. Five months later the court entered a judgment for L & M condemning the easement approved by the Council. That judgment required L & M to pay Ferreira and Milgen $8,400 compensation for the easement plus 7 percent legal interest on that amount from mid-November 1979. (§ 1268.310, subd. (c).) One month after the judgment of condemnation was entered L & M deposited the balance due Ferreira and Milgen under the judgment. (§ 1268.110.) Sometime after making that deposit L & M took possession of the condemned easement. This appeal ensued.

II

CONSTITUTIONALITY OF PRIVATE CONDEMNATION STATUTES

A

*Legislative History and Intent*

(1) In 1975 the Legislature enacted a thoroughly revised and recodified eminent domain law. (§ 1230.010 et seq.) Before that enactment former



Civil Code section 1001 authorized private persons to condemn private property for any public use listed in former section 1238. (Stats. 1970, ch. 662, § 1, pp. 1285-1288; Recommendation Proposing the Eminent Domain Law (Dec. 1974) 12 Cal. Law Revision Com. Rep. (1974) p. 1634.) The 1975 eminent domain law abolished all private condemnation authority, except for that exercised by privately owned public utilities and five types of quasi-public entities. (Recommendation Relating to Condemnation for Byroads and Utility Easements (Oct. 1975) 13 Cal. Law Revision Com. Rep. (1976) p. 1475.) The Legislature considered the former law constitutionally suspect because it seemed to authorize private condemnation for predominantly private purposes. (Sen. Legis. Com. com., 1976 Repeal of § 1238, 19 West's Ann. Code Civ. Proc., pp. 452, 463, 465-466.) With the advent of the new law private persons seeking the extension of utility service to their property could request the appropriate public entity undertake the necessary condemnation on their behalf. (*Id.*, at pp. 452, 456, 468.) This approach, however, proved unworkable due to the reluctance or unwillingness of many public entities to condemn utility easements on behalf of private persons. (Recommendation Relating to Condemnation for Byroads and Utility Easements (Oct. 1975) 13 Cal. Law Revision Com. Rep., *supra*, at p. 1476.) Consequently, the Legislature in 1976 restored private condemnation authority to owners of private property for the limited purpose of acquiring appurtenant easements to provide utility service to their property. This authority, codified in Civil Code section 1001 and section 1245.325, is designed to serve ". . . the function of opening what would otherwise be landlocked property to enable its most beneficial use. As a practical matter, land to which utility service cannot be extended . . . cannot be developed." (*Id.*, at pp. 1475-1476, fn. omitted.) Toward that end, Civil Code section 1001 provides:

"(a) As used in this section, 'utility service' means water, gas, electric, drainage, sewer, or telephone service.

"(b) Any owner of real property may acquire by eminent domain an appurtenant easement to provide utility service to the owner's property.

"(c) In lieu of the requirements of Section 1240.030 of the Code of Civil Procedure, the power of eminent domain may be exercised to acquire an appurtenant easement under this section only if all of the following are established:

"(1) There is a great necessity for the taking.

"(2) The location of the easement affords the most reasonable service to the property to which it is appurtenant, consistent with the least damage to the burdened property.



"(3) The hardship to the owner of the appurtenant property, if the taking is not permitted, clearly outweighs any hardship to the owner of the burdened property." In like manner, section 1245.325 provides:

"Where an owner of real property seeks to acquire an appurtenant easement by eminent domain pursuant to Section 1001 of the Civil Code:

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"(a) The person seeking to exercise the power of eminent domain shall be deemed to be a 'quasi-public entity' for the purposes of this article.

"(b) In lieu of the requirements of subdivision (c) of Section 1245.340, the resolution required by this article shall contain a declaration that the legislative body has found and determined each of the following:

"(1) There is a great necessity for the taking.

"(2) The location of the easement affords the most reasonable service to the property to which it is appurtenant, consistent with the least damage to the burdened property.

"(3) The hardship to the owner of the appurtenant property, if the taking is not permitted, clearly outweighs any hardship to the owner of the burdened property."

B

*Facial Constitutionality—Great Necessity*

(2) To prevent abuses which had been possible under the former eminent domain law, the Legislature made the new private condemnation authority subject to several limitations. (Recommendation Relating to Condemnation for Byroads and Utility Easements (Oct. 1975) 13 Cal. Law Revision Com. Rep., *supra*, at pp. 1476-1477.) One of these limitations is that a "great necessity" must exist for the proposed taking. (Civ. Code, § 1001, subd. (e)(1); § 1245.325, subd. (b)(1).) This limitation replaces the usual "public interest and necessity" requirement (§§ 1240.030, subd. (a), 1245.230, subd. (c)(1), 1245.340, subd. (c)(1)) with a stricter standard applicable only to the private condemnation of utility easements. (Civ. Code, § 1001, subd. (e); § 1245.325, subd. (b); see Law Rev. Com. comm., 1976 addition, 7 West's Ann. Civ. Code, § 1001, p. 259 and 19 West's Ann. Code Civ. Proc., § 1245.325, p. 606.)

(3a) Perreira and Milgen contend Civil Code section 1001, subdivision (e)(1) and section 1245.325, subdivision (b)(1) are unconstitutionally vague



because they do not contain a specific standard for determining when a "great necessity" exists for the private condemnation of a utility easement.[2] (4) We consider this argument in light of the principles that ". . . enactments should be interpreted when possible to uphold their validity [citation], and . . . courts should construe enactments to give specific content to terms that might otherwise be unconstitutionally vague. [Citations.]" (*Associated Home Builders etc., Inc.* v. *City of Livermore* (1976) 18 Cal.3d 582, 598 [135 Cal.Rptr. 41, 557 P.2d 473, 92 A.L.R.3d 1038].) We must, of course, look to legislative intent in providing such content so that the purpose of the statutes will be achieved. (*People* v. *Shirokow* (1980) 26 Cal.3d 301, 306-307 [162 Cal.Rptr. 30, 605 P.2d 859].)

(3b) As noted above, the Legislature enacted Civil Code section 1001 and section 1245.325 to enable the development of private property to its most beneficial use. Whether and how utility service can be provided to a piece of property typically depend on a number of factors, including applicable land use regulations, environmental impacts of development, anticipated service requirements, physical characteristics of the property and various cost/benefit considerations. Usually these requirements can be satisfied and utility service provided without resort to private condemnation. Occasionally, however, the necessary conditions for providing service without condemnation cannot all be met. (5) Here, for example, Perreira's no-condemnation proposal would have required importing 80,000 cubic yards of fill costing more than $500,000 and clustering the 18 homes near Hilltop Drive rather than spreading them out on large lots. This approach would have violated development and environmental guidelines established by Chula Vista city planners and would have been inordinately expensive in light of total project development costs which, at the time of trial, were expected to reach approximately $6.8 million. Under these circumstances, Perreira's no-condemnation proposal was not a reasonably acceptable means for providing

[2]Perreira and Milgen also spend one page of their reply brief arguing the other requirements of Civil Code section 1001, subdivision (e) and section 1245.325, subdivision (b) are unconstitutionally vague. We do not address these contentions because they do not merit discussion.

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utility service to Villa San Miguel. Stated another way, a "great necessity" existed for L & M's condemnation of a sewer and storm drainage easement across Ferreira's and Milgen's property because, without such an easement, Villa San Miguel could not be developed.

As illustrated by this case, determining whether a "great necessity" exists for the private condemnation of a utility easement does not turn on a comparative evaluation of condemnation and noncondemnation alternatives. "Great necessity" does not exist when a condemnation alternative is more

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preferable than a reasonably acceptable noncondemnation alternative. Under such circumstances a piece of property is not "otherwise" burdened. (See Recommendation Relating to Condemnation for Byroads and Utility Easements (Oct. 1975) 13 Cal. Law Revision Com. Rep., *supra*, at pp. 1473-1476.) "Great necessity" exists only when a condemnation alternative is the sole reasonably acceptable means for providing utility service to a piece of property.[3] This interpretation is consistent with the *rationale of Linggi v. Garoyeni* (1955) 45 Cal.2d 20 [286 P.2d 15], a landmark private condemnation case which explained a "somewhat stronger showing" of necessity must be made for the private condemnation of a utility easement. (*Id.*, at p. 27.) Although the Supreme Court held Linggi's general allegation of necessity for his proposed sewer easement was sufficient to survive a demurrer, it observed Linggi upon a trial ". . . might be denied the easement which he is endeavoring to obtain if [an]other remedy is available to him which would be less injurious to private property. For example, the evidence may show that the proper public authorities have not been asked to enlarge the present facilities in [front of Linggi's property] and make that line adequate to carry off all of the sewage from Linggi's property. [Citation.]" (*Ibid.*) Thus, Linggi would be denied his proposed easement if a reasonably acceptable noncondemnation alternative was available to provide sewer service to his property.[4] Because such an alternative was not available here, the Council correctly determined a "great necessity" existed for L & M's condemnation of a sewer and storm drainage easement across Ferreira's and Milgen's property.

C

*Facial Constitutionality—Public Use*

(6) Ferreira and Milgen next point out Civil Code section 1001 and section 1245.325 do not require utility easements be taken only for public uses. They argue these omissions violate the United States and California

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Constitutions in two ways. First, the omissions violate the constitutions' requirements that private property be condemned only for public uses. (U.S. Const., Amends. V, XIV, § 1; Cal. Const., art. I, § 19; see generally McDonald & Noll, *Review of Selected 1976 California Legislation* (1977) 8 Pacific L.J. 165, 462-463.) Second, the omissions create two groups of property owners: those subject to takings by quasi-public entities whose powers of eminent domain are limited to public uses (§ 1245.320), and those subject to takings by quasi-public entities whose condemnation powers are not so limited. (§ 1245.325.) This classification denies the second group of property owners the equal protection of the laws.

[3]The "great necessity" language in Civil Code section 1002, subdivision (a)(1) governs the acquisition of temporary rather than permanent interests in neighboring lands. These two types of easements are significantly different and thus require different standards for determining when the acquisition of such interests is appropriate. Consequently, the "great necessity" standards contained in Civil Code section 1002, subdivision (a)(1) are not pertinent to our interpretation of Civil Code section 1001, subdivision (c)(1) and section 1245.325, subdivision (b)(1).

[4]The court concluded by saying "[t]he proposed route may not be the most direct one [across Garoyeni's property] to reach the line in [back of Linggi's property], or possibly another route, although less direct, might be less injurious to all property owners concerned." (*Ibid.*) These comments address the selection of an easement location once a "great necessity" for taking the easement has been shown. (See Civ. Code, § 1001, subd. (c)(2); § 1245.325, subd. (b)(2).)

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cision to consent as an adjudicative act, and even though there was no deprivation of property, procedural due process requirements applied. (*Horn* v. *County of Ventura*, *supra*, 24 Cal.3d at pp. 612-613.) Ferreira and Milgen argue the Council denied them due process by not allowing them to discuss the blue easement #2 proposal at the August 28 hearing. They concede they had a reasonable opportunity to be heard regarding the three alternatives considered on August 14.

There is an inherent tension in a hearing procedure such as the Council conducted between encouraging a full exploration of utility service alternatives and reaching a timely decision regarding whether to adopt a resolution of consent. The basic issues the decisionmaking agency (§ 1245.310) should address through such a procedure are whether to consent to a proposed taking and, if so, to determine the appropriate location for the taking. The Council considered both issues on August 14. Having received adequate notice and a three-week postponement of the August 14 hearing, and having previously negotiated with L & M regarding its proposed condemnation of a utility easement across their property, there was no reason for Ferreira and Milgen to present to the Council on August 14 anything less than a comprehensive statement of their position. They did in fact consent both the necessity and appropriate location for L & M's proposed condemnation. Having spoken to the basic issues to be addressed, the fact Ferreira and Milgen later had another idea for a different location does not mean they had a due process right to another hearing. (See *Dami* v. *Dept. Alcoholic Bev. Control* (1959) 176 Cal.App.2d 144, 151 [1 Cal.Rptr. 213].) To hold they had such a right would be to hold the requirement of a reasonable opportunity to be heard includes the right, in effect, to have the last word in a decision making agency's hearing procedure. Were that the law, decisions regarding whether to adopt resolutions of consent could be endlessly delayed by the inadvertent omissions or deliberate strategies of prospective

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condemnors. Due process cannot become a vehicle for bringing the process of government to a halt. (*Ibid.*) The Council's hearing procedure did not violate Ferreira's and Milgen's due process rights.[3]

C

*Validity of Council's Resolution*

(11) An administrative decision which "substantially affects fundamental vested rights" (*Bixby* v. *Pierno* (1971) 4 Cal.3d 130, 144 [93 Cal.Rptr. 234, 481 P.2d 242]) invokes judicial review under the independent judgment rule of section 1094.5. Other adjudicative acts are subject to review under that section's substantial evidence test. (*Strumsky* v. *San Diego County Employees Retirement Assn.*, *supra*, 11 Cal.3d at pp. 32, 44-45.) (12) We are satisfied Ferreira's and Milgen's interests in their property represented "fundamental vested rights." (See *Unterthiner* v. *Desert Hospital Dist.* (1983) 33 Cal.3d 285, 294-296 [188 Cal.Rptr. 590, 656 P.2d 554]; *Mountain Defense League* v. *Board of Supervisors*, *supra*, 65 Cal.App.3d at pp. 728, 730.) The Council's act in consenting to L & M's condemnation, however, did not "substantially affect" those rights because, as explained above (see part III B), it did not deprive Ferreira and Milgen of any interest in their property. (See *ibid.*; see also *Bixby* v. *Pierno*, *supra*, 4 Cal.3d at pp. 144-147.) Consequently, the substantial evidence test applies to our review of the Council's decision to consent.

(13) In applying the substantial evidence test "... a reviewing court ... must scrutinize the record and determine whether substantial evidence supports the administrative agency's findings and whether these findings support the agency's decision. In making these determinations, the reviewing court must resolve reasonable doubts in favor of the administrative findings and decision." (*Topanga Assn. for a Scenic Community* v. *County of Los Angeles* (1974) 11 Cal.3d 506, 514 [113 Cal.Rptr. 836, 522 P.2d 12].) So long as they are sufficient to apprise a reviewing court of

[3]Given Ferreira's and Milgen's enumerated rights to be heard were not violated, it follows their counterpart statutory rights (§ 1245.350, subd. (d)) also were not violated. (See *Franchise Tax Board* v. *Superior Court* (1958) 36 Cal.2d 538, 549 [225 P.2d 905].)

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(U.S. Const., Amend. XIV, § 1; Cal. Const., art. I, § 7, subd. (a).) In considering these arguments we must construe the challenged statutes in context and harmonize them with companion provisions of an overall statutory system. (*People* v. *Shirokow*, *supra*, 26 Cal.3d at p. 307.)

The above arguments wrongly assume public use requirements should have been included in Civil Code section 1001 and section 1245.325. In these statutes the Legislature empowered private property owners to acquire utility easements by eminent domain. These provisions thus constituted a legislative declaration that the private condemnation of utility easements is for a public use. (§ 1240.010.) It was therefore unnecessary to include requirements which such takings satisfy by definition. Even so, the Legislature did include public use requirements applicable to such takings in other provisions of the new eminent domain law. Civil Code section 1001, subdivision (c) supplants the specific requirements of section 1240.030. However, it does not abrogate the fundamental public use limitation applicable to all takings by public and quasi-public entities. (§§ 1240.010, 1245.380; see Law Rev. Com. com., 1976 addition, 7 West's Ann. Civ. Code, § 1001, p. 259.) Similarly, section 1245.325, subdivision (b) supplants only the requirements of section 1245.340, subdivision (c). The public use limitation of section 1245.340, subdivision (a) still applies to all takings by quasi-public entities. (See Law Rev. Com. com., 1976 addition, 19 West's Ann. Code Civ. Proc., § 1245.325, p. 606.) Civil Code section 1001 and section 1245.325 are not facially unconstitutional for allowing the condemnation of private property for private uses.

D

*Constitutionality as Applied—Public Use*

(7) Ferreira and Milgen further argue Civil Code section 1001 and section 1245.325 are unconstitutional as applied in this case. They argue L & M will profit from its development of an exclusive residential neighborhood,

[146 Cal.App.3d 1053]

and thus its condemnation of their property is for a private rather than a public use. There is no question, however, that L & M intends to use its easement to provide sewer and storm drainage service to Villa San Miguel. "[I]t is clear that the ordinary taking of private property for the purpose of constructing storm drainage systems is a taking for a public use." (*Bauer* v. *County of Ventura* (1955) 45 Cal.2d 276, 284 [289 P.2d 1]; see also *Marin* v. *City of San Rafael* (1980) 111 Cal.App.3d 591, 595 [168 Cal.Rptr. 750]; 2A Nichols on Eminent Domain (3d rev. ed. 1981) § 7.5155, p. 7-179.) Condemnation of private property to provide sewer service also is a taking for a public use. (See *City of Oakland* v. *Oakland Raiders* (1982) 32 Cal.3d 60, 71-72 [183 Cal.Rptr. 673, 646 P.2d 835]; *Linggi* v. *Gervonni*, *supra*, 45 Cal.2d at pp. 23-26; 2A Nichols on Eminent Domain, *supra*, § 7.5154.) "Once it is determined that the taking is for a public purpose, the fact that private persons may receive benefit is not sufficient to take away from the enterprise the characteristics of a public purpose. [Citations.]" (*Redevelopment Agency* v. *Hayes* (1954) 122 Cal.App.2d 777, 804 [266 P.2d 105], cert. den., 348 U.S. 897 [99 L.Ed. 705, 75 S.Ct. 214]; see, e.g., *County of Los Angeles* v. *Anthony* (1964) 224 Cal.App.2d 103, 106-107 [36 Cal.Rptr. 308], cert. den., 376 U.S. 963 [11 L.Ed.2d 981, 84 S.Ct. 1125], rehg. den., 377 U.S. 940 [12 L.Ed.2d 304, 84 S.Ct. 1333]; *City of Carlsbad* v. *Wight* (1963) 221 Cal.App.2d 756, 759-760 [34 Cal.Rptr. 820].) Under these authorities we conclude Civil Code section 1001 and section 1245.325 are not unconstitutional as applied in this case.

III

VALIDITY OF COUNCIL'S CONSENT

A

*Nature of Council's Act*

(8) The nature of the Council's act in consenting to L & M's condemnation presents an important threshold question. If that act was adjudicative rather than legislative, then procedural due process requirements apply (*Horn* v. *County of Ventura* (1979) 24 Cal.3d 605, 612-613 [156 Cal.Rptr. 718, 596 P.2d 1134])

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and judicial review of the Council's decision to consent is by administrative (§ 1094.5) rather than traditional (§ 1085) mandamus. (*Sirmenky* v. *San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 34-35, fn. 2 [112 Cal.Rptr. 805, 520 P.2d 29].) Arguably, the function the Council performed by its act was, in substance, the exercise of its power of eminent domain. (See § 1245.330.) That power is an inherent attribute of sovereignty (*City of Oakland* v. *Oakland Raiders*, *supra*, 32

[146 Cal.App.3d 1054]

Cal.3d at p. 64; 5 Witkin, Summary of Cal. Law (8th ed. 1974) Constitutional Law, § 529, subd. (a), p. 3828) and its exercise is a legislative act under both federal (*Joiner* v. *City of Dallas* (N.D.Tex. 1974) 380 F.Supp. 754, 764-766, 769-771, affd., 419 U.S. 1042 [42 L.Ed.2d 637, 95 S.Ct. 614], rehg. den., 419 U.S. 1132 [42 L.Ed.2d 831, 95 S.Ct. 818]; see generally 1 Nichols on Eminent Domain (3d rev. ed. 1981) § 4.11, pp. 4-138 to 4-153) and California law (*People* v. *Chevalier* (1959) 52 Cal.2d 299, 304 [340 P.2d 598]; *Walzer* v. *Board of Supervisors* (1894) 101 Cal. 15, 21 [35 P. 353]). Thus, under one line of cases, the Council's act was legislative. (*Pitts* v. *Perluss* (1962) 58 Cal.2d 824, 834 [377 P.2d 83]; *City of Chula Vista* v. *Superior Court* (1982) 133 Cal.App.3d 472, 486 [183 Cal.Rptr. 909]; *Wilson* v. *Hidden Valley Mun. Water Dist.* (1967) 256 Cal.App.2d 271, 280 [63 Cal.Rptr. 889].) Given, however, the particularity of the Council's decision and the small size and number of parcels involved and relatively few property owners affected, its act may have been adjudicative. (*Pacific Legal Foundation* v. *California Coastal Com.* (1982) 33 Cal.3d 158, 168 [188 Cal.Rptr. 104, 655 P.2d 306]; *Horn* v. *County of Ventura*, *supra*, 24 Cal.3d at pp. 612-614; but see *Arnel Development Co.* v. *City of Costa Mesa* (1980) 28 Cal.3d 511, 514, 516-519, 522-523 [169 Cal.Rptr. 904, 620 P.2d 565].) Faced with this uncertainty, the Council took the prudent course by treating its act as adjudicative. (See *Mountain Defense League* v. *Board of Supervisors* (1977) 65 Cal.App.3d 723, 729 [135 Cal.Rptr. 588].) Because we conclude the Council's decision to consent withstands scrutiny under the stricter standards applicable to adjudicative acts, we do not resolve the threshold classification issue.

B

*Due Process*

(9) "Due process principles require reasonable notice and opportunity to be heard before governmental *deprivation* of a significant property interest. [Citations.]" (*Horn* v. *County of Ventura*, *supra*, 24 Cal.3d at p. 612; citing California and federal cases, italics added.) Such principles apply to temporary as well as final deprivations of property. (*Brooks* v. *Small Claims Court* (1973) 8 Cal.3d 661, 666-667 [105 Cal.Rptr. 785, 504 P.2d 1249], citing California and federal cases). (10) Viewed from a practical standpoint, the Council's act in consenting to L & M's condemnation did not deprive Ferreira and Milgen, even temporarily, of any interest in their property. The final deprivation resulted from the entry of the lower court's judgment of condemnation. Before that, no temporary deprivation occurred. Although L & M obtained an order for possession as of mid-November 1979, Ferreira and Milgen challenged that order through their mandamus

[146 Cal.App.3d 1055]

proceeding (see Assem. Legis. Com. com., 1975 add., 19 West's Ann. Code Civ. Proc., § 1255.410, pp. 705-706) and remained in possession until after L & M deposited the balance due them under the judgment of condemnation. Thus the practical effect of the Council's act was simply to authorize L & M to commence a private condemnation action against Ferreira and Milgen. In that action L & M bore the burden of proving the propriety of its proposed taking. (See *Lingel* v. *Garewal*, *supra*, 45 Cal.2d at p. 27; Recommendation Relating to Condemnation for Byroads and Utility Easements (Oct. 1975) 13 Cal. Law Revision Com. Rep., *supra*, at p. 1477; compare § 1245.230.) Ferreira and Milgen do not contend the lower court denied them a reasonable opportunity to be heard during the trial of L & M's condemnation action.

As noted above, the Council treated its de-

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the basis for the agency's decision (*Id.*, at pp. 514, 517, fn. 16), the necessary findings may be formal or informal and may be contained in the agency's order or decision. (*Hadley* v. *City of Oxnard* (1974) 43 Cal.App.3d 121, 128 [117 Cal.Rptr. 513].)

(14) The Council's findings appear in the text of its resolution of consent. We have reproduced that resolution in an appendix to this opinion.

[146 Cal.App.3d 1857]

with paragraph numbers added in brackets for easy reference. The findings contained in the resolution satisfy all applicable statutory requirements and thus support the Council's decision to consent. Paragraphs 6 through 9 generally describe the public uses to be served by L & M's easement (§§ 1240.010, 1245.340, subd. (a)), and paragraph 11 identifies the statutory authority for L & M's condemnation of that easement (§ 1245.340, subd. (a)). Paragraphs 1, 9 and 10, with accompanying exhibits, describe quite precisely the location and extent of the easement to be taken. (Civ. Code, § 1001, subd. (c)(1); § 1245.340, subd. (b).) Paragraphs 13 and 14 explain the great necessity for L & M's taking of the easement (§ 1245.325, subd. (b)(1)), while paragraph 15 justifies the location selected for the taking (Civ. Code, § 1001, subd. (c)(2); § 1245.325, subd. (b)(2)). Finally, paragraph 16 presents the Council's assessment of the relative hardships the parties would bear if the taking was either disapproved or permitted. (Civ. Code, § 1001, subd. (c)(3); § 1245.325, subd. (b)(3).) The pertinent evidence supporting these findings also appears in the Council's resolution. (See ¶¶ 2, 4-8, 13-16.) That evidence was presented to the Council by its staff and the parties at the hearings on August 14 and 28. Taken together with the other evidence presented to the Council at those hearings (see part I, *ante*), we conclude the Council's findings were supported by substantial evidence.

## IV

### Rate of Interest

(15) In their final argument Ferreira and Milgen contend the lower court violated their rights to "just compensation" under the Fifth and Fourteenth Amendments to the United States Constitution by applying the legal rather than market rate of interest to their $8,400 condemnation award. Authority exists for awarding interest at either rate. (Legal rate: *Brown* v. *United States* (1923) 263 U.S. 78, 86-87 [68 L.Ed. 171, 182, 44 S.Ct. 92]; *United States* v. *Baugh* (5th Cir. 1945) 149 F.2d 190, 193; see also 3 Nichols on Eminent Domain (3d rev. ed. 1981) § 8.63[3] at pp. 8-360 to 8-362; market rate: *United States* v. *429.39 Acres of Land* (9th Cir. 1980) 612 F.2d 459, 464, 465; *United States* v. *Blankinship* (9th Cir. 1976) 543 F.2d 1272, 1276-1277.) Ferreira and Milgen argue, in essence, they have not received an adequate return on their condemnation award. They do not challenge the adequacy of the award itself. In the particular circumstances of this case, we need not resolve the constitutional issue Ferreira and Milgen raise. In addition to seven percent legal interest, Ferreira and Milgen have received value from remaining in possession until after L & M deposited the balance due them under the judgment of condemnation. (See § 1268.330, subd.

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(a).)[4] Given their receipt of legal interest plus use of the property, Ferreira and Milgen cannot complain they have received an inadequate return on their condemnation award. As a practical matter, their return has been sufficient.

## V

### Disposition

Judgments affirmed.

Cologne, Acting P. J., and Lewis, J.,* concurred.

### Appendix

Resolution No. 9753

Resolution of the City Council of the City of Chula Vista Consenting to the Acquisition

[4] L & M has not cross-appealed the interest awarded Ferreira and Milgen.

*Assigned by the Chairperson of the Judicial Council.

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OF AN APPURTENANT EASEMENT IN PROPERTY AT VILLA SAN MIGUEL BY MEANS OF EMINENT DOMAIN

The City Council of the City of Chula Vista does hereby resolve as follows:

[1] WHEREAS, L & M Professional Consultants, Inc. (hereinafter "L & M") is engaged in the development and construction of a residential subdivision in the City of Chula Vista, State of California, more commonly known as Villa San Miguel, Chula Vista Tract 79-15, and

[2] WHEREAS, there presently exists no sewer hookup capable of servicing said tract, and

[3] WHEREAS, the development and construction of said tract is in the public interest, and for the benefit of the City of Chula Vista, and

[4] WHEREAS, said tract cannot be developed for human habitation without the provision of adequate sanitation facilities, and

[5] WHEREAS, the public interest, and good sanitation and engineering practices make the use of septic systems or other alternatives to the connection of this tract with the sewer system of the City of Chula Vista at this location neither desirable nor feasible, and

[6] WHEREAS, the public interest, and good sanitation and engineering practices require that said tract obtain adequate access to the sewer system of the City of Chula Vista, and

[7] WHEREAS, the public interest requires the provision of adequate drainage facilities to insure that runoff will not accumulate on adjacent parcels, but rather can be adequately channeled into the storm drains of the City of Chula Vista, and

[8] WHEREAS, the City has studied various alternatives for the provision of sewer and drainage for said property, and

[9] WHEREAS, the most feasible path for a sewer hookup and drainage is found to run from the northerly corner of said project, in a generally northerly corner of said project, ye

[146 Cal.App.3d 1009]

a generally northerly direction to Bonita Glen Drive, as shown on the plat map attached hereto as Exhibit "A" and as further described in the attached legal description, Exhibit "B", and

[10] WHEREAS, said proposed easement crosses a portion of Lot 1, Sunny Vista Map No. 2207, which land is held in fee title, according to the latest equalized assessment rolls, by Mr. Frank Pesquira and Magna Investment Company, and

[11] WHEREAS, L & M possesses the right to acquire said easement by the use of the power of eminent domain, pursuant to Civil [sic] Code Section 1001 and Sections 1245.210, et seq., of the Code of Civil Procedure, provided that the City of Chula Vista consents to said acquisition as required by Sections 1245.220, 1245.240, 1245.250 and 1245.260 of the Code of Civil Procedure, and

[12] WHEREAS, L & M has requested the City of Chula Vista to authorize the commencement of proceedings in the [sic] eminent domain for the acquisition of said easement, and

[13] WHEREAS, there is a great necessity for the acquisition of said easement in that without the acquisition of said easement Villa San Miguel will lack connection to the sewer system of the City of Chula Vista, creating a public health and sanitation hazard and rendering completion of said tract for the use and enjoyment of the citizens of the City of Chula Vista impossible, and

[14] WHEREAS, there is also a great necessity for the taking of said easement in that the drainage portion of said easement is necessary for the protection of adjacent landowners from erosion, runoff, flooding, inundation, and attendant sanitation problems, and

[15] WHEREAS, the configuration and location of said easement as shown on Exhibits "A" and "B" affords the most reasonable service to the property to which it is appurtenant, consistent with the least damage to the burdened property because said easement is located in such a fashion to correspond with the proposed alignment of the driveway to be used for the development of the subject property by the owner and, therefore, will provide easy access for maintenance and will have the least interference with the use of the property and can be developed in such a manner so as to assure adequate flowage and proper hydraulic entry to the sewer and storm drain systems of the City of Chula Vista and will, therefore, achieve the necessary public purpose intended and constitutes the most minimal and reasonable degree of interference with the use and enjoyment of the burdened property, and

[16] WHEREAS, the hardship to the owner of the appurtenant property, if the taking is not permitted, will be substantial, in that the investment in the development of Villa San Miguel will be seriously impaired or lost and the hardship to the owner of the burdened property is minimal, in that the easement is located in such a fashion as to minimize interference with the reasonable use and enjoyment of the burdened property and the hardship to the owner of the appurtenant property, if the taking is not permitted, clearly outweighs any hardship to the owner of the burdened property, and

[17] WHEREAS, the property described in the resolution is necessary for the proposed projects.

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Chula Vista does hereby consent to the acquisition of the above-described easement by L & M by the institution of proceedings in eminent domain and this resolution is intended to comply with Section 1245.230 of the Code of Civil Procedure.

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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

REDEVELOPMENT AGENCY OF THE CITY OF BURBANK etc.,

Plaintiff and Respondent,

v.

WALTER L. GILMORE, JR., et al.,

Defendants and Appellants.

2 Civ. No. 68906
(Super.Ct.No. C 345 175)

COURT OF APPEAL-SECOND DIST.
FILED
JAN 20 1984
CLAY ROBBINS, JR. Clerk
Deputy Clerk

APPEAL from judgments of the Superior Court of Los Angeles County. Affirmed in part; reversed in part and remanded. APPEAL from orders of the Superior Court of Los Angeles County. Affirmed. Earl F. Riley and Campbell M. Lucas, Judges.

Irsfeld, Irsfeld & Younger, O'Neill and Huxtable, and Richard L. Huxtable for Defendants and Appellants.

William B. Rudell, City Attorney (Burbank), and Richard W. Marston, Senior Assistant City Attorney, for Plaintiff and Respondent.

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AP. C

This case presents the question whether interest payable to a condemnee for delay in the payment of the value of property taken before trial should be awarded at the legal rate or at the prevailing market rate.

Defendants Walter L. Gilmore, Jr., Pamela A. Gilmore, George W. Strattan, Howard L. Hudson, and Frances P. Hudson appeal from the respective judgments entered against them in this eminent domain action. Howard and Frances Hudson also appeal from the order denying their motion to recover litigation expenses and the order granting plaintiff's motion to tax costs.

On November 13, 1980, plaintiff filed its complaint seeking condemnation of a parcel of real property owned by George Strattan and the Gilmores (parcel 9) and a separate parcel of real property owned by the Hudsons (parcel 11). On December 9, 1980, upon plaintiff's deposit of $200,000 with the court clerk, an order was entered authorizing plaintiff to take possession of parcel 9. On that same date, upon plaintiff's deposit of $160,000 with the court clerk, an order was entered authorizing plaintiff to take possession of parcel 11. An additional $126,390 was deposited on February 16, 1982, with respect to parcel

11. Each order for possession became effective 90 days after service of the order. The values of the respective parcels were thereafter determined at trial.

Strattan and the Gilmores introduced evidence that from March 1981 to April 1982 the "National Average Mortgage Contract Rate for Major Lenders" on the purchase of previously occupied homes varied from 13.91 percent to 15.80 percent, and that after March 1981 interest rates being paid on intermediate-term certificates of deposit by various banks and savings and loans ranged from 13.5 percent to in excess of 15 percent. Mr. Gilmore's declaration stated that, in purchasing property comparable to parcel 9 on February 10, 1981, the Gilmores made a down payment of $200,000 and borrowed $225,000 at 14 percent interest to pay the balance of the purchase price.[1/]

The Hudsons introduced a summary of information obtained from the Federal Reserve Bulletin concerning prevailing interest rates in 1981 and January 1982 for long-term bond rates for government and utility bonds as well as conventional mortgate rates. The publication showed that in 1981 the average long-term government bond

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1/ The declaration incorporated by reference facts set forth in the "Notice of Intention to Call Defendant, Walter L. Gilmore, Jr., as a Valuation Witness," which was filed July 29, 1981. Because the latter document was listed in appellants' designation of clerk's transcript but is not part of the clerk's transcript, we have reviewed that document upon obtaining the superior court file. (Cal. Rules of Court, rule 12(a).)

interest rates ranged from 9.97 to 15.13 percent and that in January 1982 the average interest rate for long-term United States government bonds was 14.48 percent and for long-term state and local government bonds was 12.97 percent. It also indicated that in 1981 average interest rates on conventional mortgages ranged from 15.10 percent to 18.05 percent and that in January 1982 the average interest rate for a conventional mortgage was 17.20 percent.

The Hudsons also introduced the publication's summary of prime rates charged by banks on short-term business loans and interest rates on the money and capital markets on state and local notes and bonds rated Aaa by Moody's Investors Service. The summary indicated that the average prime rate ranged from 15.75 percent to 20.30 percent in 1981, and that it was 15.75 percent in January 1982 and 16.56 percent in February 1982. The publication also showed that the average interest rate for the money and capital markets on state and local notes and bonds rated Aaa was 10.43 percent in 1981 and ranged from 12.20 percent to 12.30 percent in January and February 1982. The declaration of Richard Huxtable, attorney for the Hudsons, stated that Mr. Huxtable had personal knowledge that during this period of time

conventional purchase money note deeds of trust required interest rates at or above 14 percent per annum.

No evidence was introduced by plaintiff concerning the prevailing interest rates. Based on this state of the record, appellants moved that interest for the delay in payment of compensation be awarded at 16.3 percent per annum from the effective date of the orders for possession to the date of payment.

On June 30, 1982, an interlocutory judgment was entered as to parcel 11, fixing the value of the property at $284,000. Because of the deposit of $160,000, $124,000 was awarded to the Hudsons with "interest at the legal rate" from March 18, 1981, to the date of payment.

On July 21, 1982, an interlocutory judgment was entered as to parcel 9, reciting that the value of the property was $500,000 and that $326,590 had already been paid to Strattan and the Gilmores. The judgment awarded Strattan and the Gilmores $173,257 and awarded the County of Los Angeles $153 for real property taxes. Strattan and the Gilmores were awarded interest on the sum of $300,000 at the rate of 7 percent per annum from March 16, 1981, to February 16, 1982, and interest on the sum of $173,410 at 7 percent per annum from February 16, 1982, to the date of payment.

I

We hold that, where there has been a pretrial taking of private property, interest on the unpaid value of the property must be paid at the prevailing market rate in order to provide just compensation in accordance with the Fifth Amendment of the United States Constitution.

In Seaboard Air Line Ry. v. U. S. (1923) 261 U.S. 299, the United States Supreme Court explained the Fifth Amendment prohibition against taking private property for public use without just compensation, stating: "The compensation to which the owner is entitled is the full and perfect equivalent of the property taken. [Citation.] It rests on equitable principles and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken. [Citation.]" (Id., at p. 304.)[2/] It therefore follows that, where the fair market value of the property

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[2/] The Fifth Amendment just compensation clause was held applicable to the states through the due process clause of the Fourteenth Amendment in Chicago, Burlington &C. R'D v. Chicago (1897) 166 U.S. 226, 241.

has not been paid contemporaneously with the taking, the owner is entitled to interest for delay in payment from the date of the taking until the date of payment. (Miller v. United States (Ct. Cl. 1980) 620 F.2d 812, 837; see Albrecht v. United States (1947) 329 U.S. 599, 602; Seaboard Air Line Ry. v. U. S., supra, 261 U.S. 299, 306.) Payment of such interest at the prevailing rate is necessary to achieve the federal constitutional mandate that the property owner be provided just compensation. (Miller v. United States, supra, 620 F.2d 812, 837-839.)

Our Legislature has provided for interest on condemnation awards by Code of Civil Procedure sections 1268.310 and 1268.320.[3/] Section 1268.310 provides, "The compensation awarded in the proceeding shall draw legal interest from the earliest of the following dates: [¶] (a) The date of entry of judgment. [¶] (b) The date the plaintiff takes possession of the property. [¶] (c) The date after which the plaintiff is authorized to take possession of the property as stated in an order for possession." Section 1268.320 provides, "The

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3/All California statutory references hereinafter are to the Code of Civil Procedure.

compensation awarded in the proceeding shall cease to draw interest at the earliest of the following dates: [¶] (a) As to any amount deposited pursuant to Article 1 (commencing with Section 1255.010) of Chapter 6 (deposit of probable compensation prior to judgment), the date such amount is withdrawn by the person entitled thereto. [¶] (b) As to the amount deposited in accordance with Article 2 (commencing with Section 1268.110) (deposit of amount of award), the date of such deposit. [¶] (c) As to any amount paid to the person entitled thereto, the date of such payment."

The legal rate of postjudgment interest was 7 percent until July 1, 1983 (Cal. Const., art. XV, § 1), and thereafter was set by section 685.010 at 10 percent. Article XV, section 1, of the California Constitution provides in pertinent part, "The rate of interest upon a judgment rendered in any court of this state shall be set by the Legislature at not more than 10 percent per annum. Such rate may be variable and based upon interest rates charged by federal agencies or economic indicators, or both. [¶] In the absence of the setting of such rate by the Legislature, the rate of interest on any judgment rendered in any court of the state shall be 7 percent per

annum. [¶] The provisions of this section shall supersede all provisions of this Constitution and laws enacted thereunder in conflict therewith."[4/] Section 685.010, which became operative July 1, 1983, provides in pertinent part as follows: "Interest accrues at the rate of 10 percent per annum on the principal amount of a money judgment remaining unsatisfied." Section 685.110 provides, "Nothing in this chapter affects the law relating to prejudgment interest."

Defendants' evidence shows, and indeed judicial notice reveals, that in recent years market rates of interest have greatly exceeded 7 percent and have also exceeded the new statutory rate of 10 percent. Thus, we are confronted with the issue whether the California Constitution's limitation of interest conflicts with the federal constitutional requirement of payment of just compensation for the taking of private property for a public purpose. As the just compensation right

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4/Because of this final sentence in article XV, section 1, of the California Constitution, our discussion of the right of just compensation is based on the federal constitutional right and not on California Constitution, article I, section 19.

Textron, Inc. v. Commissioner of Transp. (1978) 176 Conn. 264 [407 A.2d 946]; Department of Transp., etc. v. Rasmussen (1982) 108 Ill.App.3d 615 [64 Ill.Dec. 119, 439 N.E.2d 48]; Marine Midland Bank, N.A. v. State (Ct. Cl. 1983) 118 Misc.2d 472 [460 N.Y.Supp.2d 902]; Township of Wayne in County of Passaic v. Cassatly (1975) 137 N.J.Super. 464 [349 A.2d 345]; State by Spannaus v. Carney (Minn. 1981) 309 N.W.2d 773.)

Payment of prejudgment or postjudgment interest at a rate far below what the condemnee could reasonably have expected to earn had the award been contemporaneous with the taking simply does not accord with the federal constitutional requirement of just compensation. In 1940, the California Supreme Court stated that legal interest was "frequently accepted as the basis for fixing the measure of damages" caused by delay in compensating the owner for a taking. (Metropolitan Water Dist. v. Adams (1940) 16 Cal.2d 676, 681.) We infer from the court's statement that the legal rate of interest was "frequently accepted" for such purpose that such rate of interest might not always be sufficient to provide just compensation. Recently, in United States v. Blankinship, supra, 543 F.2d 1272, the Ninth Circuit Court of Appeals

has its source in the federal constitution, that right supersedes state constitutional and statutory limitations of interest in the context of eminent domain. We hold that the determination of the rate of prejudgment and postjudgment interest necessary to provide just compensation is a question for the trial court. (See § 1268.340.) It is a matter not subject to preordination by legislative fiat. A governmental entity desiring to avail itself of the sovereign right to pretrial possession should not be permitted also to make use of the property owner's just monetary award at bargain interest rates.

We do not here tread on virgin judicial soil. Numerous courts have recognized that the determination whether a particular rate of interest is sufficient to provide just compensation is a judicial function and that the rate of interest provided by statute may apply only if it is adequate under federal constitutional requirements. (See Seaboard Air Line Ry. v. U. S., supra, 261 U.S. 299, 306; Miller v. United States, supra, 620 F.2d 812, 837-838; United States v. 429.39 Acres of Land (9th Cir. 1980) 612 F.2d 459, 464-465; United States v. Blankinship (9th Cir. 1976) 543 F.2d 1272, 1275-1276;

construed the 6 percent interest rate (40 U.S.C. § 258a) specified by the Declaration of Taking Act (40 U.S.C. § 258a et seq.) as the minimum rather than the maximum rate of interest applicable to delay damages, noting that "a rate no greater than 6 percent in some instances will contravene the Fifth Amendment." (United States v. Blankinship, supra, 543 F.2d 1272, 1276.) The court held that the market rate of interest for the period of delay should be used, and it provided guidelines for determination of that rate. (Id., at pp. 1276-1277.) In Matter of City of New York (1983) 58 N.Y.2d 332 [462 N.Y.Supp.2d 619, 449 N.E.2d 399], the New York Court of Appeals held that the 6 percent statutory rate of interest was inadequate to provide just compensation for the years 1978-1981 because the average interest rates on stable investments during that period ranged from 8.3 percent in 1978 to 12.5 percent in 1981. (Also see Department of Transp., etc. v. Rasmussen, supra, 108 Ill.App.3d 613 [64 Ill.Dec. 119, 439 N.E.2d 48] [6 percent rate of interest "'grossly inadequate'"]; Miller v. United States, supra, 620 F.2d 812, 838 [6 percent rate of interest "neither reasonable nor judicially acceptable"].)

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In L & M Professional Consultants, Inc. v. Ferreira (1983) 146 Cal.App.3d 1038, the court noted but found it unnecessary to reach the question whether application of the legal rather than market rate of interest may violate the Fifth Amendment right to just compensation. (Id., at p. 1057.) The court stated that Brown v. United States (1923) 263 U.S. 78, 86-87, is authority for awarding interest at the legal rate. (L & M Professional Consultants, supra, at p. 1057.) We do not so read the Brown case. Rather, we read Brown as holding that, to comply with the conformity provision of the federal Act of August 1, 1888 (Act of Aug. 1, 1888, ch. 728, § 2, 25 Stat. 357),[2/] a federal court should follow such a state provision "if it is a fair one." (Brown, supra, at p. 87.) A corollary is implied that, if it is not fair, such a state provision should not apply.

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2/ The conformity provision read, "The practice, pleadings, forms and modes of proceeding in causes arising under the provisions of this act shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of the court to the contrary notwithstanding." (Act of Aug. 1, 1888, ch. 728, § 2, 25 Stat. 357.)

Because the Fifth Amendment right to just compensation is a federal constitutional right, the trial court had a duty to determine from the evidence that the legal rate of interest in California established by the California Constitution and by Code of Civil Procedure section 1268.320 would not place the owners in "as good [a] position pecuniarily as [they] would have been [in] if [their] property had not been taken." (Seaboard Air Line Ry. v. U. S., supra, 261 U.S. 299, 304.)

Unrebutted evidence indicated that neither the 7 percent rate of interest provided by California Constitution, article XV, section 1, nor the 10 percent statutory rate of interest effective July 1, 1983, was sufficient to provide just compensation to defendants.

The Gilmores' contention that they should be awarded interest at the same rate at which they were required to borrow money cannot be sustained. Although the rate at which the Gilmores borrowed is relevant, that rate alone is not determinative. (Georgia-Pacific Corp. v. United States (Ct. Cl. 1980) 640 F.2d 328, 366.) Evidence of interest rates in general during the pertinent period has more bearing on the issue of the proper rate than does the Gilmores' isolated

transaction. Prevailing interest rates charged for the financing of real property during the period in question are particularly relevant to determination of the rate of interest needed to provide just compensation. Also relevant to such determination are loan origination fees that would be required to obtain interim financing because of the discrepancy between the amount of the deposited funds and the ultimate award.

II

Howard and Frances Hudson filed a memorandum of costs and disbursements listing attorney's fees and appraisal fees as recoverable items. They also moved for recovery of those items as litigation expenses pursuant to section 1250.410, subdivision (b). Their motion was opposed by plaintiff, and plaintiff also moved for an order striking those items from the Hudsons' memorandum of costs and disbursements. The trial court denied the motion for litigation expenses and granted the motion to tax costs.

The Hudsons contend that those rulings were erroneous because the award was significantly higher than the highest offer made by plaintiff. The Hudsons rely on County of Los Angeles v. Kranz (1977) 63 Cal.App.3d 656

and Community Redevelopment Agency of Hawthorne v. Friedman (1977) 76 Cal.App.3d 188 in support of this contention. When the motions under review in Kranz and Friedman were ruled upon, recovery of a condemnee's litigation expenses was governed by former section 1249.3, which provided in pertinent part, "If the court, on motion of the defendant made within 30 days after entry of judgment, finds that the offer of the condemnor was unreasonable and that the demand of the condemnee was reasonable, all viewed in the light of the determination as to the value of the subject property, the costs allowed pursuant to Section 1255 shall include all expenses reasonably and necessarily incurred in preparing for and in conducting the condemnation trial including, and not limited to, reasonable attorney's fees [and] appraisal fees . . . ." (Stats. 1974, ch. 1469, § 1, p. 3208, italics added.) Former section 1249.3 has been replaced by section 1250.410. When the motions to tax costs and to recover litigation expenses were made in the instant case, subdivision (b) of section 1250.410 provided as follows: "If the court, on motion of the defendant made within 30 days after entry of judgment, finds that the offer of the plaintiff was unreasonable

and that the demand of the defendant was reasonable viewed in the light of the evidence admitted and the compensation awarded in the proceeding, the costs allowed pursuant to Section 1268.710 shall include the defendant's litigation expenses. In determining the amount of such litigation expenses, the court shall consider any written revised or superseded offers and demands filed and served prior to or during trial." (Italics added.)[6/] (Section 1235.140 defines "litigation expenses" as including attorney's fees and appraisal fees reasonably and necessarily incurred by the defendants.)

Thus, the mathematical relation between the plaintiff's highest offer and the award is but one factor

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6/Section 1250.410, subdivision (b), now provides: "If the court, on motion of the defendant made within 30 days after entry of judgment, finds that the offer of the plaintiff was unreasonable and that the demand of the defendant was reasonable viewed in the light of the evidence admitted and the compensation awarded in the proceeding, the costs allowed pursuant to Section 1268.710 shall include the defendant's litigation expenses. [¶] In determining the amount of such litigation expenses, the court shall consider the offer required to be made by the plaintiff pursuant to Section 7267.2 of the Government Code and any other written offers and demands filed and served prior to or during the trial."

to be considered by the trial court. Section 1230.410 requires the court to evaluate the reasonableness of the plaintiff's offer in light of the award and the evidence adduced at trial. The trial court's determination of that issue is a resolution of a question of fact and will not be disturbed on appeal if supported by substantial evidence. (City of El Monte v. Ramirez (1982) 128 Cal.App.3d 1005, 1009-1014.)

Although appellants have supplied us with a reporter's transcript of the hearing on the motions for recovery of litigation expenses and to tax costs, the Hudsons have neglected to supply this court with a reporter's transcript of the trial. Since the reporter's transcript of the trial has not been provided, we must presume that the evidence adduced at trial supports the determination that plaintiff's offer was reasonable. (Ibid.)

That portion of the judgment involving parcel 11 that awards the Hudsons interest at the legal rate is reversed and remanded for a determination of the weighted average market rate of interest during the time period mentioned in that judgment. The judgment involving parcel 11 is otherwise affirmed. That portion of the

judgment involving parcel 9 that awards the Gilmores and Strattan interest at 7 percent is reversed and remanded for a determination of the weighted average market rate of interest during the period of time mentioned in that judgment. The judgment involving parcel 9 is otherwise affirmed. The order granting the motion to tax costs is affirmed. The order denying the Hudsons' motion to recover litigation expenses is affirmed.

CERTIFIED FOR PUBLICATION.

DALSIMER, J.

We concur:

LILLIE, Acting P.J.

HANSON (Thaxton), J.

## PROOF OF SERVICE

I, Michael B. Poynor, of the law firm of Sternberg, Eggers, Kidder & Fox, was duly admitted to practice before the Supreme Court in the State of California on January 5, 1972, and before the United States Supreme Court on June 23, 1975. My firm address is 2020 Central Savings Tower, 225 Broadway, San Diego, California 92101. On February 17, 1984, within the permitted time I served copies of the PETITION FOR WRIT OF CERTIORARI addressed as follows below. The last day to file this petition is February 21, 1984, which is 90 days from November 23, 1983, the day on which the California Supreme Court denied petitioners' request for hearing.

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| Office of the Clerk<br>United States Supreme Court<br>Washington, D.C. 20543 | Original plus<br>40 Copies |
| Supreme Court of the<br>State of California<br>3850 Wilshire Boulevard<br>Los Angeles, CA 90010 | 3 Copies |
| Court of Appeal<br>Fourth Appellate District<br>Division One<br>6010 State Building<br>1350 Front Street<br>San Diego, CA 92101 | 3 Copies |
| Superior Court<br>Appeals Department<br>220 West Broadway, 3rd Floor<br>San Diego, CA 92101 | 3 Copies |
| John K. Van de Kamp<br>California State Attorney General<br>1550 "K" Street, Suite 511<br>Sacramento, CA 95814 | 3 Copies |

Richard A. Paul, Esq. 3 Copies
Gray, Cary, Ames & Frye
2100 Union Bank Building
San Diego, CA 92101

Thomas J. Harron, Esq. 3 Copies
Chula Vista City Attorney
276 Fourth Avenue
Chula Vista, CA 92010

The above parties were served by placing the necessary copies in an envelope, first-class postage prepaid and mailed by deposit in a United States mailbox at San Diego, California.

I declare under penalty of perjury that the foregoing is true and correct, and that this Proof of Service was executed on February 17, 1984.

Michael B. Poynor

STATE OF CALIFORNIA )
) SS
COUNTY OF SAN DIEGO )

On February 17, 1984, before me, the undersigned, a Notary Public in and for said State, personally appeared Michael B. Poynor, personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged that such person executed the same.

WITNESS my hand and official seal.

OFFICIAL SEAL
E. J. GÜNER
NOTARY PUBLIC-CALIFORNIA
PRINCIPAL OFFICE IN
SAN DIEGO COUNTY
My Commission Expires [illegible]

Notary Public in and for said